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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1] **TRANSCRIPT OF RECORD**

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the Court Room thereof in the Post Office Building in the City of Richmond, Virginia, on the first Monday in the month of October, being the sixth day of the same month, in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable Luther B. Way, Senior United States District Judge for the Eastern District of Virginia, and The Honorable Robert N. Pollard, United States District Judge for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

Before the Honorable Robert N. Pollard

Civil Action. No. 129

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Plaintiff,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Defendant

COMPLAINT—Filed January 17th, 1941

1. Plaintiff is and has been duly appointed, qualified and acting executor of the Estate of John Lewis Tiller, Deceased, who died on March 21, 1940, as the result of injuries sustained as hereinafter described.

2. Before and at the time of the injuries sustained by plaintiff's decedent resulting in his death, all of which is herein complained of, defendant owned and operated a [fol. 2] railroad extending through the State of Virginia and several other states and was a common carrier engaged in commerce between the several states, territories, District of Columbia, and foreign nations; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was employed by defendant in such commerce, his duties being in furtherance of interstate and foreign commerce and directly, closely and

substantially affecting such commerce. This action is brought by plaintiff for the benefit of the surviving widow and minor child, the dependents of the decedent, under and pursuant to the provisions of 45 U. S. C. A. Section 51-60, and acts amendatory thereto, known as the Federal Employers Liability Act.

2. On or about March 20, 1940, the defendant was engaged in shifting, coupling, and uncoupling cars from one train to another on its tracks in or about the South Richmond stockyards near Clopton Road, Stop 5, Petersburg Pike, Chesterfield County, Virginia, in order to make up the cars for a southbound freight train.

3. While defendant was thus engaged, plaintiff's decedent was performing his duties as an employee of defendant and was inspecting the seals on various freight cars and performing other services.

4. Defendant's officers, agents and servants, other than plaintiff's decedent, acting within the scope of their employment, then and there performed the operations in which they were engaged in a careless, reckless, unlawful and negligent manner in that while they knew or in the exercise of ordinary care should have known full well the position of the decedent and the work in which he was engaged, they failed to keep a proper lookout for him, to give proper signals warning of the approach of the train, to keep the head car properly lighted, or lighted at all, to warn deceased of a hitherto unprecedented and unexpected change in the manner of shifting the cars although they knew full well that such a change would place him in a position of [fol. 3] extreme danger, if he were not so warned, to operate their train, engine and cars in a careful and prudent manner under the circumstances then and there existing, to furnish deceased a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of all of which a car propelled by defendant's engine and operated by its crew ran up against, struck, dragged, ran over, crushed and mangled decedent, causing him severe and grievous injuries from which he suffered excruciating agony and pain for many hours during which he was conscious until his resulting death on March 21, 1940. After the deceased was thus injured, bleeding profusely and in a severely critical condition, defendant's

servants, agents, officers and employees did not exercise ordinary care in providing prompt and adequate medical treatment and attention for deceased, but on the contrary carelessly and negligently left deceased for some hours unattended by medical doctors and hospitals and failed to procure an ambulance, all of which caused great loss of blood and suffering to deceased, and all of which failures to exercise ordinary care in an emergency contributed to his death. Prior to these injuries, decedent was a strong, able-bodied man capable of earning and actually earning $185.00 a month. At the time of his death, he was fifty-one (51) years of age. Decedent's dependents, who are his widow and minor child, have also suffered great pecuniary loss and damage as a result of his fatal injuries and death.

5. This action is commenced within one year from the date of decedent's fatal injuries.

Wherefore, plaintiff demands judgment against the defendant in the sum of Fifty Thousand ($50,000.00) Dollars and costs.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for Plaintiff, 1407 State-Planters Bank Building, Richmond, Virginia.

[fol. 4] Tucker, Bronson, Satterfield & Mays, Counsel.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for Plaintiff, 1407 State-Planters Bank Building, Richmond, Virginia.

Tucker, Bronson, Satterfield & Mays, Counsel.

ANSWER—Filed February 6, 1941

[Title of court and style of case omitted]

For a First Defense

(a) The defendant admits the allegation of paragraph one of the Complaint.

(b) Defendant admits that it is a common carrier by railroad, engaged in interstate commerce; it admits that the injuries complained of occurred while defendant was en-

gaged in such commerce and while plaintiff's decedent was employed by it in such commerce.

(c) Defendant alleges that at or about 7 P. M. o'clock on March 21, 1940, it was engaged in shifting, coupling and uncoupling cars from one train to another and from one track to another on its tracks in its railroad yards just south of the City of Richmond, in Chesterfield County, Virginia, known as Clopton Yards, in order to make up a regular southbound freight train. One of the regular duties of plaintiff's decedent was to ride and protect said southbound freight train. Defendant is without knowledge sufficient to permit it to affirm or deny whether at the time plaintiff's decedent received the injuries of which complaint is made, he was inspecting the seals on the various freight cars, or was actively performing other services, or was preparing to perform services. Defendant, on the other hand, avers [fol. 5] that there were no eye-witnesses to the accident in which plaintiff's decedent was killed; that whether he was killed in alighting from a moving train and stepped immediately in the path of a cut of cars moving in the opposite direction, or whether he was standing upon the tracks upon which said cut of cars was approaching, or whether he had fallen upon said tracks from a moving car before he was struck by said cut of cars are all matters of speculation, guess and random judgment, and can form no basis for legal liability.

(d) Defendant admits that while it was thus making up said southbound freight train, plaintiff's decedent was struck by a moving cut of cars in the said railroad yard, but it denies that it, its officers, servants or employees other than plaintiff's decedent were guilty of any negligence whatsoever in the premises, and it denies each and every allegation of negligence contained in paragraph four of the Complaint.

For a Second Defense.

Defendant alleges that plaintiff's decedent assumed all risks normally and necessarily incident to his employment. He knew that the shifting of cars and the making up of a train in a railroad yard after dark is attended by much danger, and the risks normally and necessarily attendant on such operations were assumed by plaintiff's decedent.

The injuries and death of plaintiff's decedent were the proximate result of a risk thus assumed by him.

For a Third Defense.

While defendant denies that its officers, servants or employees other than plaintiff's decedent were guilty of any negligence whatsoever, nevertheless, defendant alleges that if plaintiff's decedent was negligently injured as alleged in the Complaint, the plaintiff's decedent, himself, was guilty of contributory negligence in that, knowing that he was at work in a place of continual danger, he failed to keep a proper lookout for his own protection and failed to heed [fol. 6] the approach of cars being moved by an engine, but, on the contrary, carelessly and negligently permitted himself to be struck by a car so propelled, and that this negligence on the part of plaintiff's decedent proximately contributed to his injuries and death; or that plaintiff's decedent negligently alighted or fell from a moving train immediately in the path of a cut of cars moving in the opposite direction.

(Sgd.) J. M. Townsend by C. D. F. Collins Denny, Jr., Richmond, Virginia, Attorneys for Defendant.

J. M. Townsend, Denny, Valentine & Davenport, Counsel.

Legal and timely service of a copy of the written answer is hereby acknowledged this 6th day of February, 1941.

(Sgd.) Richmond Moore, Jr., Counsel for Plaintiff.

Motion to Strike Out Second and Third Defenses of Defendant—Filed February 13, 1941

[Title of court and style of case omitted]

The plaintiff moves the court to strike out the second and third defenses set up by defendant in its answer heretofore filed herein, upon the ground that they are both jointly and severally insufficient in law.

(Sgd.) Richmond Moore, Jr., Attorney for Plaintiff, 1407 State-Planters Bank Building, Richmond, Virginia.

Notice of Motion

To: Collins Denny, Jr., Attorney for Defendant, Richmond, Virginia.

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court on the 24th [fol. 7] day of February, 1941, at 9:30 o'clock A. M., or as soon thereafter as counsel may be heard.

(Sgd.) Richmond Moore, Jr., Attorney for Plaintiff, 1407 State-Planters Bank Bldg., Richmond, Virginia.

Legal and timely service of the foregoing motion is hereby acknowledged this 13th day of February, 1941.

(Sgd.) Collins Denny, Jr., Attorney for Defendant.

Order on Motion to Strike Out Second and Third Defenses of Defendant—Entered and filed February 24, 1941

Civil Action File No. 129

Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, Deceased, Plaintiff,

v.

Atlantic Coast Line Railroad Company, a Virginia Corporation, Defendant.

Upon consideration of plaintiff's motion to strike out the second and third defenses set out in the answer, it is ordered that the determination thereof be postponed until the trial of this Cause.

(Sgd.) Robert N. Pollard, United States District Judge.

February 24th, 1941.

Motion for Leave to Amend Complaint—Filed March 21st, 1941

(Title of Court and style of case omitted)

The plaintiff, Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, deceased, moves the Court for leave to amend its complaint herein as follows:

In paragraph 1 next to the last line amend March 22, 1940, to March 21, 1940.

In paragraph 2 first line amend March 21, 1940 to March 20, 1940.

In paragraph 4 twenty-third line amend March 22, 1940 [fol. 8] to March 21, 1940.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for Plaintiff, 1407 State-Planters Bank Bldg., Richmond, Virginia.

Notice of Motion

To: Collins Denny, Jr., Attorney for defendant, Travelers Building, Richmond, Virginia.

Please take notice that the undersigned will bring the above motion in for hearing by the Court on the 21st day of March, 1941, at nine-thirty o'clock A. M., or as soon thereafter as counsel may be heard.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for plaintiff, 1407 State-Planters Bank Bldg., Richmond, Virginia.

Legal and timely service of the within notice is hereby acknowledged this 20th day of March, 1941.

(Sgd.) Collins Denny, Jr., Attorney for defendant, Travelers Building, Richmond, Virginia.

Order Amending Complaint—Entered and filed March 21, 1941

Civil Action File No. 129.

Hattie Mae Tuller, Executor of the Estate of John Lewis Tiller, Deceased, Plaintiff,

v.

Atlantic Coast Line Railroad Company, a Virginia Corporation, Defendant.

This day came the parties hereto by their attorneys and upon motion the plaintiff is hereby granted leave to amend her complaint as follows:

1. In paragraph 1 thereof next to the last line amend [fol. 9] March 22, 1940 to March 21, 1940.

2. In paragraph 2 first line amend March 21, 1940 to March 20, 1940.

3. In paragraph 4 twenty-third line amend March 22, 1940 to March 21, 1940.

And the Clerk is directed to make the amendment thereof accordingly.

(Sgd.) Robert N. Pollard, United States District Judge.

March 21, 1941.

REQUEST FOR ADMISSION—Filed September 3, 1941

(Title of Court and style of case omitted)

Plaintiff, Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, deceased, requests defendant, Atlantic Coast Line Railroad Company, to make the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the following statement is true: "The physical layout of defendant's system of railroad tracks in Clopton yards, both at the Clopton road crossing and within a mile in all directions therefrom, remained unchanged from the time of the injuries to decedent, March 20, 1941, until September 1, 1941."

You are requested to make reply hereto on or before September 17, 1941.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorneys for Plaintiff, 1407 State-Planters Bank Building, Richmond, Virginia.

A Copy of this request for admission has been delivered [fols. 10-12] to Collins Denny, Jr., Attorney for defendant, Travelers Building, Richmond, Virginia this 3rd day of September, 1941.

(Sgd.) Dave E. Satterfield, Jr., Richmond Moore, Jr., Attorney for Plaintiff.

[fols. 13-69] **Joint Appendix to Briefs of Appellant and Appellee**

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Plaintiff,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia corporation, Defendant.

No. 4909

STIPULATION

It is hereby stipulated by and between counsel for the parties herein that, since the portions of the certified transcript of record designated by appellant herein to be printed as an appendix to its brief incorporate certain portions of the certified transcript of record which the appellee desires to be printed as an appendix to its brief, the parties hereto agree to print the following as a "Joint Appendix" to the briefs of both parties herein.

Dated at Richmond, Va., this 3rd day of March, 1942.

COLLINS DENNY, JR.,
J. M. TOWNSEND,
Counsel for Appellee.

RICHMOND MOORE, JR.,
Counsel for Appellant.

JOINT APPENDIX TO BRIEFS OF APPELLANT AND APPELLEE

IN THE

United States Circuit Court of Appeals

FOURTH CIRCUIT

No. 4909

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,
APPELLANT,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION.

REPORTERS TRANSCRIPT

(2-4)

MR. TOWNSEND: May it please the Court, our friends have asked us to agree that a report which was made of this accident to the State Corporation Commission may be intro-

duced. That report was made under the provisions of Section 3988 of the Code of Virginia, which is the same as the section of the Interstate Commerce Act which provides that monthly reports shall be made to the State Corporation Commission. The language is exactly the same in the two codes except that one is to be made to the Corporation Commission and the other to the I. C. C.

Section 41 of the U. S. C. A. provides that neither said report, that is the monthly report which is to be made of accidents, nor any report of said investigation, nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation. That has been interpreted by the editors of the Code in this language—I first thought this was a part of the Act but I find it is merely an editorial comment: "Neither the report required by Section 38 of this Title nor any report of the investigation provided for in Section 40 of this Title nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

So that the report to the Interstate Commerce Commission is absolutely out, under the provisions of that statute. There was a slight difference in the report which was made to the State Corporation Commission and that made to the I.C.C. These gentlemen asked that we agree that that is a copy of the report made to the State Corporation Commission. We agree that it is a copy but we do not think it is competent evidence because we think that the public policy announced by the section of the Code that the I. C. C. reports shall not be evidence should also govern in a case under the Employers Liability Act which is governed entirely by Federal rules and Federal practice and we think the public policy of the United States would prohibit the introduction of the report to the State Corporation Commission in this case.

THE COURT: Do you gentlemen intend to offer the report to the State Corporation Commission in evidence?

MR. MOORE: Yes, sir.

THE COURT: You do not intend to offer the report to the I. C. C.?

MR. MOORE: No, sir.

THE COURT: Do you intend to refer to it in your opening statement?

MR. MOORE: Yes, sir.

* * * * * *

(6)

THE COURT: I am not ruling now on the admissibility. Statements of counsel are not evidence. I rule at this time that counsel may refer to the report in the opening statement and when the report is offered in evidence I will make a specific ruling on that.

MR. TOWNSEND: May we refer to the way in which those reports are made up?

THE COURT: You can refer to what you expect to prove, yes, sir, in regard to how the reports are made up, in your opening statement.

MR. TOWNSEND: If your Honor pleases, we note an exception to the ruling of the Court.

* * * * * *

(7-12)

HATTIE MAE TILLER, the plaintiff, being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

Q. Are you the wife of John Lewis Tiller, deceased? A. Yes.

Q. When were you married? A. November 22, 1930.

Q. And where do you live? A. 2606 Barton Avenue.

Q. How long have you lived there? A. 25 years.

Q. Have you any children, Mrs. Tiller? A. Yes, one.

Q. A boy or girl? A. A boy.

Q. How old is your little boy? A. 6 years old.

Q. Is this he? A. Yes.

Q. By whom was your husband employed? A. Atlantic Coast Line Railroad.

Q. How long had he been in the employ of that company? A. 16 years.

Q. What was his duty or title with the company, if you know? A. Sergeant of Police.

Q. What was the date of his death? A. March 22, 1940.

Q. Where did he die? A. Grace Hospital.

Q. Do you recall what time he left home on the 20th day of March, 1940? A. Around 6 o'clock.

Q. In the afternoon? A. Yes.

* * * * * *

Q. What was the state of your husband's health previous to this accident? A. Very good.

Q. His hearing? A. Very good.

Q. His sight? A. Very good.

Q. Was he a man addicted to strong drink? A. Not at all. He did not drink.

Q. Was he a large or small man? A. He was large.

Q. Do you recall his weight? Do you know his weight? A. Yes, around 200, I should say—6 feet.

Q. What was Mr. Tiller's age, Mrs. Tiller? A. He was fifty-one at the time this happened.

Q. He had passed his fifty-first birthday? A. Yes.

* * * * * *

Q. What became of his flashlight? A. I have that. It was given to me.

Q. Who gave it to you? A. One of the Coast Line employees.

Q. Do you recall the gentleman's name? A. Mr. Angle.

Q. I hand you this and ask you is that your husband's flashlight, the one he had on the evening of March 20th? A. Yes.

Q. When Mr. Tiller usually went out on this particular run, what time would he return to your home? A. Around five in the morning.

* * * * * *

MR. SATTERFIELD: I want the flashlight in evidence after it has been identified.

THE COURT: Is there any objection?

MR. TOWNSEND: No, sir.

(The flashlight was filed and marked Plaintiff's Exhibit No. 1)

* * * * * *

MR. SATTERFIELD: There were two witnesses who were excused, Mr. Dementi and Mr. Noland who will identify this photograph.

THE COURT: Do you want to introduce that picture?

MR. SATTERFIELD: I ask that it be received in evidence.

(The photograph referred to was filed and marked Plaintiff's Exhibit No. 2)

(13-17)

WILLIE MASON MYRICK, a witness called by the plaintiff and being first duly sworn, testified as follows:

* * * * * *

EXAMINED BY MR. SATTERFIELD:

Q. How long altogether have you been in the employ of the railroad company? A. Ever since the 31st of December, 1918, up to the present time.

Q. And you have been an engineer since 1924? A. Yes.

Q. Are you what is known as road engineer or yard engineer? A. Both.

Q. Do I understand by that that you serve in whatever capacity you are called to serve? A. I serve any capacity in which my seniority rights entitle me—to preferred jobs.

Q. On March 20, last year, 1940, were you on duty as an engineer for the Atlantic Coast Line Railroad Company? A. March 20?

Q. 1940. A. Yes, sir.

Q. Were you on Clopton Yard the night that Mr. Tiller was fatally injured? A. Yes, sir.

Q. Were you in charge of an engine on that occasion? A. Yes, sir.

Q. Was it a road or yard engine? A. Road engine.

Q. What was the number of it? A. 1635.

Q. What was the reason for your presence in Clopton Yard on that evening? A. For the benefit of taking that train from Clopton to South Rocky Mount.

Q. Where did you get your engine that day? A. Acca Roundhouse.

Q. Is that a terminal of the R. F. & P. Railroad Company to the north of Richmond? A. And the Coast Line.

Q. When you got your engine what were your instructions at Acca? A. We don't get any instructions from Acca. We get our instructions just before we leave the yard with our train. Our conductor gives us our instructions.

Q. Who was your conductor on this occasion? A. Mr. Wilbur.

Q. And what were your instructions? A. My instructions was to go by way of Clopton. I don't know exactly how it should be worded but offhand that is practically it. I was to go by the way of Clopton. I don't know whether the instruction read "Look out for yard engine", but that is practically the way we get our instructions, to go by the way of Meadow and call up sometime before we cross over from Meadow to the old line.

Q. The purpose of going to Meadow—will you tell the

Gentlemen what that was for? A. That is for taking the train from South Richmond to South Rocky Mount, in other words, from Clopton to South Rocky Mount.

Q. When you say take the train from South Richmond, do you refer to the train that comes from Byrd Street Station down the old Coast Line tracks to Clopton Yard? A. Yes, sir.

Q. How many cars did you carry away from Acca as you started in the direction of Meadow and Clopton on that evening? A. I don't know the amount of cars that we had. I judge it was a small amount of cars. I might say it was twelve or fifteen.

Q. And you arrive at Clopton at what time? A. I don't know the exact time I arrived at Clopton. It was about six o'clock, I guess.

Q. At Clopton? A. Yes, sir. I don't know exactly the time I arrived at Clopton.

Q. What time did you leave Acca? Would you have any idea about that? A. No, sir, I did not.

Q. What time were you called for duty that day? A. We were called for 6:30.

Q. You didn't leave before 6:30, did you? A. No, sir.

Q. Did you proceed immediately from Acca to Meadow and Clopton Yard? A. No, sir, we come down to the yard and backed up in the R. F. & P. yard and got the remains of our train and proceeded to Meadow and get instructions from the Yardmaster to cross over and what is necessary for us to do.

Q. You come over by way of the Belt Line bridge, don't you, and then by way of a switch down what is known as the old James River Line into Meadow? A. That is right.

Q. How long does it take you after you get started to come from the R. F. & P. freight yards to the point where you stopped on the Meadow track? A. I would say about fifteen or twenty minutes.

Q. Mr. Myrick, here is an aerial photograph which has been offered in evidence. Will you point out if you can, on

this, for the benefit of the jury, the track on which your train came in from Acca? A. I broke my glasses.

* * * * * * *

(17-26)

Q. This would be north and this would be Richmond. This is on the way to Petersburg and this is Clopton Yard and here is the stock yards and here is your yard office. Do you orient yourself? A. Yes, sir.

Q. Show the jury on what track you came in. A. It was up here where we come down on the old line from Meadow to this office and stopped.

Q. Which one of those two tracks were you on? A. This track is headed south?

Q. Yes. A. We were on the right track, this track over here.

Q. The far track? A. Yes.

Q. Show the jury where you stopped? A. We stopped here on the brow of the hill just north of this office.

Q. And what was your next order? A. The next order—then we received instructions from our Yardmaster, which was Mr. Jones, to pull down clear of this slow siding and back in the clear by his direction and on a signal from the trainman.

Q. What trainman? A. Mr. Dickens.

Q. Mr. Dickens is the brakeman on that train? A. That is right.

Q. In consequence of that order what did you do? A. We backed in the slow siding.

Q. First, before you backed, what did you do? Did you go with your train? A. No, we cut off three cars on the brow of the hill.

Q. Tell these gentlemen what you mean by "cut off three cars?" Do you mean you left three cars there or you cut three off and took with you? A. We held to three cars.

Q. What kind of cars were they? A. They were gondolas, high side gondolas, the way they are worded.

Q. What kind of freight do they carry? A. Coal and gravel and cement and so forth.

Q. And you cut three of those off the train and proceeded on that track on the far side of the picture up in the yard? A. That is right.

Q. And after you got up in the yard what did you do? A. After we got up in the yard we received a signal to back in this slow siding.

Q. Point out to the jury the slow siding into which you backed. A. This is the track here and here is the slow siding over that crossing.

Q. How many tracks are there on the main line of the Coast Line? A. Two.

Q. Point them out. A. Here are the two tracks over here.

Q. That is the Meadow track? A. That is right.

Q. I am talking about on the old main line of the Coast Line. A. The old main line is the track I come down.

Q. What are these tracks? A. This track here is the system—

Q. Where is the main line northbound in that picture? A. The main line northbound?

Q. Southbound. A. Here it is (indicating).

Q. What is that next track? A. That is the slow siding.

Q. Is that the track you backed down on? A. Yes, sir.

Q. You went up in the yard, the switch was thrown, and you came back down this slow siding; is that it? A. That is right.

Q. And were three cars being pushed or backed up by your engine? A. That is right.

Q. What was the purpose of that move? What were you doing that for? A. The purpose of that move was authorized by the yard foreman—in other words, the yardmaster, to back in that slow siding for the purpose of classifying the train that we brought there from Byrd Street Station.

Q. What was the matter, if anything, with the classification of the train brought from Byrd Street Station? A. It was an error in the classification at Byrd Street Station.

Q. What was the error? A. The error was that it was a car in the wrong classification.

Q. Do you mean by that that they put a car in the wrong place in the train that came from Byrd Street Station? A. Yes, sir.

Q. What had to be done with it? A. That car had to be classified at Clopton Yard.

Q. What do you mean by "classified at Clopton Yard?" A. It had to be put in a track until the right evidence could be got on that particular car. It was in a classification for one destination and it was in the wrong classification.

Q. Do you mean it had to be put in the right place in your train when you went out? A. That is right.

Q. Where was that car going, do you recall? A. No, I do not.

Q. When you proceeded to back up your engine, tender, and these three cars, who was in the cab of the engine with you? A. My fireman, Mr. Wright.

Q. Who was on the rear end of those cars or on the front end of those cars as they were backed up? A. Mr. Dickens, my trainman.

Q. He is the brakeman, isn't he? A. Yes, sir.

Q. You were on the engineer's seat which would put you on the left side of this train going in a back-up movement, wouldn't it? A. Yes.

Q. And Mr. Wright was on the fireman's seat, was he? A. Yes, sir.

Q. And that would put him on the right-hand side of the cab on a back-up movement? A. That is right.

Q. As you moved back into that slow siding was there any train moving in an opposite direction on your right-hand side or on the fireman's side of your engine? A. Yes, sir.

Q. Which train was that? A. That was the train that came from Byrd Street Station.

Q. As you went back to the road crossing I want you to tell the Gentlemen of the Jury what happened, in your own way. A. When we stopped, when the cars that we taken

away from Clopton come from Byrd Street Station, they stopped somewhere near the crossing and when I received a signal from Mr. Dickens we pulled off with the head end cut which was second 209 classification and we pulled off the second time and when they pulled off the second time my trainmen give me the signal to back up. We made a back-up movement when the other portion of the train that had come from Byrd Street Station was going ahead.

Q. Mr. Dickens was on what part of that car that was on the front of your back-up movement? A. He was on the leading car up to the crossing.

Q. What part of the car was he on? Where was he riding? A. He was on the left side on the back-up movement.

Q. What part of the car was he riding on? A. Head end.

Q. What part of the head end of the car was he riding on? A. That was the front end.

Q. Was he on top of the car? A. He was on the side.

Q. How was he riding? A. He rode on the step of the car with the hand holds and I guess you might say with both hands on the grab iron, which we call it, the step iron, for the purpose of going up on top of the car.

Q. When you saw him he was riding on the step with both hands on the grab iron? A. Yes, sir.

Q. Did you see him—Mr. Dickens—get off that car? A. Yes, I saw him get off the car just about the time it got to the crossing or near the crossing.

Q. When it got to or near the crossing and he got off, which way did he go? A. When he got off he come back toward me which was the head end of the engine.

Q. Was your train stiil moving slowly across when he started back toward the head end? A. Yes, sir.

Q. When did your train stop and where did it stop? A. The engine and tender stopped practically on the crossing. You might say the rear end of the engine and the front end of the tender stopped about on the crossing.

Q. Did any of you know then that Mr. Tiller had been hurt? A. No, sir.

Q. What happened in the cab of your engine from that point on? A. When we stopped at the crossing I would say we stayed there for—I won't say how many minutes or seconds it was, but Mr. Wright excited my curiosity by saying that he saw a flashlight which was on the east side, on his side. He said, "I see a flashlight over here burning."

Q. Did you look? A. I asked him. When he made the remark that "I saw a flashlight over there burning", I thought it was some of the members of our crew had lost a light and I told him to go and get the light. He said, "No, I am afraid to go down in the dark by myself; you come go with me." I thought, "All right, I will go along with him." In the meantime, when I got off the engine to go down to investigate the light to see who it was, or whether it was any of our trainmen, I had a thought in my mind about Mr. Tiller and I went on and started toward the flashlight and I asked my fireman Wright—I said, "Mr. Wright, have you a flashlight?" I said, "Let me have it, please." He give me his flashlight and we walked on by the light and flashing the light under the side of each car and we saw something black about the second car from the engine—I mean about the first car from the engine. That was Mr. Tiller's cap. When we saw Mr. Tiller's cap it was plain evidence that something had happened to Mr. Tiller, so we went on a little bit further, which was about the second car, and we saw Mr. Tiller's gun and that was unbreached—what I mean, the chamber was out—and after going on and seeing the gun, that was further evidence that Mr. Tiller had been hurt somewhere, some place of the train. So we walked on up a little bit further and I flashed my light up under the north end of the car which was the rear end of the head car, and I saw the evidence up there balled up under the wheels.

Q. What was that? A. That was Mr. Tiller.

Q. Was he still alive—conscious, I mean—when you got to him? A. He wasn't conscious when we first got to his aid. He didn't regain consciousness until we got him out in the condition that we found him in.

Q. Did somebody pour some water on him? A. Yes, sir.

Q. When he did regain consciousness did you hear him say anything, Mr. Myrick? A. Yes, sir.

Q. What did he say? A. He asked what hit him and how did he get hurt.

Q. What was his position there when you got to him under the north end of that head car? A. He was balled up between the brake and the wheel, you might say in the hanger.

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(27)

Q. What did you do then? A. I got straddle, you might say, and pulled the brake shoe and hanger back from the wheel which was on the portion of his leg that you might say was pushed up about the center of the wheel and we worked his leg down and got him down clear of the outside and straightened him out between the two tracks.

Q. Were other members of the train crew there at that time? A. No other members, other than myself and Mr. Dickens.

Q. Mr. Dickens? A. Yes.

Q. Was Mr. Wright with you? A. Yes, sir.

Q. What time would you say the accident occurred, or do you know? A. When we got Mr. Tiller out I looked at my watch and I made a remark to Mr. Wright that it was 7:15 and I taken the number of the car but I don't recall the number now.

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(27-28)

Q. Let me ask you this: Your train was stopped there. What had become of the train that was moving south? A. He was gone. He was then making his other classification on the brow of the hill. In other words, he was making his other movement to the portion of the train that I had brought from Acca.

Q. He was south of the road? He had gone down past

this road in the direction of Petersburg, hadn't he? A. Yes, sir.

Q. And that left you on this slow siding with your three cars and I believe your tender, and Mr. Tiller? A. That is right.

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(29-30)

Q. How long have you been handling that particular assignment, Mr. Myrick? A. Well, we are not assigned to that particular train every day.

Q. You have been since 1924 an engineer? A. Yes, sir.

Q. And from time to time you, like other engineers, get that assignment, do you not? A. That is right.

Q. Have you ever, in all of your experience and in all that period of years, ever made that movement before? A. No, sir.

Q. Was there any street light or any kind of a light there at Clopton Road where you cross over, where the tracks cross over that road? A. No, sir.

Q. Was it dark when the accident happened? A. Yes, sir.

Q. Have you any idea how high those three cars are that you were backing up? A. About ten foot.

Q. Are they the steel open cars that carry coal mostly? A. Yes, sir.

Q. Are they known as hopper cars? A. Yes, sir.

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(31)

Q. How close to that road did you find that flashlight? A. We found the flashlight just about here (indicating).

Q. What would be approximately the distance, would you say, from the edge of the road? A. I would say about four or six foot from the crossing.

BY THE COURT:

Q. North or south of the crossing? A. North of the crossing.

By Mr. Satterfield:

Q. You say the cap was the next thing you picked up? A. Yes, sir.

Q. And that was how far from the flashlight? A. That was about the head car from the engine.

Q. What part of the head car—front, middle or back? A. About the front end.

Q. Then the flashlight was found almost under the tender of the engine that you were operating? A. Just about.

Q. How much further on from the cap was the pistol? A. You mean from the pistol?

Q. Yes. A. We had passed by the cap when we found the gun.

Q. I mean how much further on was the gun from the cap? A. It was about the next car which was about the second car.

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(32-33)

Q. When you got over this road going northward with Dickens flagging you on that end, did you blow your whistle? A. No, sir.

Q. You had your bell ringing? A. Yes, sir.

Q. And when you had your bell ringing was this train moving southward at the same time on the track next to you? A. Yes, sir.

Q. Did you know Mr. Tiller? A. Yes, sir.

Q. How long had you known him? A. I have been knowing Mr. Tiller about ten or twelve years previous to the accident.

Q. Will you state to the jury whether or not on other occasions you had seen Mr. Tiller there in the yard? A. Yes, sir, I have seen him there several times, daylight and night.

Q. Doing what? A. Doing his duty.

Q. And what was that? A. That was protecting the train, to see if there were any cars broken open and see if any contents had been taken from them or any seals broken.

Q. Where would he usually stand to check those seals? A. He was at various places. I have seen Mr. Tiller on one or two different occasions. You see, most anybody can get off a train with a flashlight at night and you couldn't say that was Mr. Tiller but in daytime I have seen Mr. Tiller get off at that crossing once or twice, to my knowing.

Q. You knew from time to time he checked those cars there as they came by? A. That was his duty.

Q. You have seen, at night when it would go by, him flash it off and on, haven't you? A. Yes. I couldn't say it was Mr. Tiller but it was some agent attending to his business, flashing the light on the seals to see whether they were broken or the car being bothered with from the time it left the Byrd Street Station.

Q. When you would see him in the daytime would he be standing on the slow siding? A. He would be somewhere near this crossing.

(33-36)

CROSS EXAMINATION

BY MR. DENNY:

Q. Mr. Myrick, let us go a little further with the yard situation and see if I correctly have what you say. The lower part of this picture is north with the tracks running due north and south, so Richmond is down below the picture. I understand that you came in from Acca and Meadow on the track shown on this picture, on the extreme west track, up on the hill? A. Which is the right.

Q. Which is the right-hand track or the extreme west track in the whole picture? A. Yes, sir.

Q. Then in the center of the picture and north of Clopton Road you find three tracks parallel to one another. The extreme east track or the one nearest Petersburg Pike is the northbound main line track, is it not? A. Right.

Q. The middle track is the southbound main line? A. That is right.

Q. And the western of the three tracks is what is known as slow siding? A. That is right.

Q. When you brought your train in from Acca, you came in on the western track up on the hill and stopped, as I understand it, before you got to Clopton Road and north of Clopton Road. A. Right.

Q. A cut was then made and you held to these three empty coal hoppers? A. That is right.

Q. And you proceeded south across Clopton Road, well down into the yard, so that a switch, which is not shown on this picture at all— A. Yes, sir.

Q. Is that southern switch here shown the switch to which you went? A. That is the switch.

Q. In other words, right at the very top of the picture is the switch. A. That is right, the dark place up here.

Q. You had to pull south of that switch? A. Yes, three car lengths.

Q. And then that switch was thrown and you backed your cars going north in the slow siding? A. Right.

Q. Mr. Myrick, can you give us any estimate of the percent of time during a month, we will say, that you may be out at Clopton in connection with the make-up of 209, as one of the engineers? A. Well, I would say—you mean the amount of days in a month?

Q. Yes, through the years. Are you on that run two days a month or three days a month? A. Well, I reckon it would average up—I reckon the record would show it would average up about five or six days a month.

Q. For how long a time prior to this accident would you say that you had been on that run an average of five or six days a month? Had that lasted all the way from 1924 or from some later date? A. No, you see from 1924 it was numbers of times that I was in the yard service and I didn't have no opportunity whatever to be in road service which would permit me to be at this particular place any time during any period of that month.

Q. About when did you get sufficiently far in the road

service to begin to be assigned to this freight train 209? A. I was marked up on a regular job the 11th day of December and I remained.

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(36-41)

Q. The 11th day of December, 1940? A. Yes, sir.

Q. Do you mean 1940 or do you mean 1939? A. 1939 was when Mr. Tiller was hurt. 1940 was this last past year, what I am alluding to, this particular time. In 1940 I was marked up on a regular job, the 11th of December, and was cut out of a regular job the 8th of August.

Q. You mean the 8th of this past August? A. Yes, sir.

Q. 1941? A. Yes, sir.

Q. Let us leave the time since Mr. Tiller's death. Back around the time of Mr. Tiller's death how often were you drawing that train? A. Just about, you might say, I reckon the record would show that I would make about an average trip in there five or six days per month.

Q. For how long prior to Mr. Tiller's death had you been on that train an average of five or six times a month? A. That has been practically ever since Mr. Tiller's death.

Q. I say before Mr. Tiller's death. A. Oh, before Mr. Tiller's death I would say it was months that I wasn't in Clopton Yard at all.

Q. So that before Mr. Tiller's death on just occasional times were you on that run? A. Well, I reckon we are not assigned to any regular run and in freight work we work first in and first out. I would say I would average in two or three trips per month.

Q. And that had gone on for about how long? A. That had gone on for about, I reckon, from about 1938.

Q. So that beginning about 1938 you had averaged two trips a month up to Mr. Tiller's death. For about two years prior to his death you had been in there a couple of times a month? A. Yes.

Q. Mr. Myrick, Clopton Yard, as I understand it, is a

freight classification yard where the freight trains are assembled? A. Yes, sir.

Q. In classifying the various cars so as to make up the train necessitates the shifting of cars back and forth on various tracks repeatedly? A. Yes, sir.

Q. Are you gentlemen and all the employees of the railroad instructed that when at work in a classification yard they must watch out for their own safety and must watch for the movements of trains? A. Yes, sir.

Q. Is that, so far as you know, thoroughly understood by all railroad employees, that warnings and signals will not be given in a classification yard but each man must watch those movements for himself? A. You mean are you alluding to now?

Q. In a classification yard is a man directed that he must watch these shifting movements and guard himself against injury, that there are not people there watching out for him? A. That is right, everybody other than the trainmen. The trainmen look out for each other's signals.

Q. On this particular night after Mr. Dickens, your brakeman, had made a cut at the rear of the third coal hopper, he gave you, I suppose, the signal to proceed on down the hill? A. South of the slow siding.

Q. Then after he threw the switch did he give you the signal to start backing up? A. Yes, sir.

Q. Did you see what he did after he gave you that signal? A. He rode the head car on or near the crossing.

Q. Could you see him on that head car? A. Yes, sir.

Q. Could you see him or could you simply see the lantern that he was carrying? A. I could see the lantern directly that he was carrying.

Q. In other words, it was dark. A. Yes, sir.

Q. And you saw a lantern—someone holding a lantern on the lead end of the lead car? A. Yes, sir.

Q. Did you see any other light up north of you around that crossing? A. No, sir, I did not.

Q. I suppose you were facing to the north in the direction you were going, were you not? A. Yes, sir.

Q. And as you looked to the north around that crossing did you see anyone showing a flashlight? A. No, sir, I did not.

Q. How high up off the ground would you say Mr. Dickens had this lantern? A. Well, Mr. Dickens was about five foot six, I would judge, and he was on the step of the car.

Q. So that would put the lantern up around the middle of the car in height? A. Yes, sir, I guess so, about the middle of the car.

Q. Was the cut of cars out of Byrd Street which had come in on the southbound main line moving there across Clopton Road as you were backing up? A. The first cut was.

Q. The first one? A. Yes, sir.

Q. So that you had your movement going north and you had the movement of the Byrd Street cars going south. Your movement was north, wasn't it? A. Yes, sir.

Q. And the movement of cars from Byrd Street was south? A. That is right.

Q. And they were on parallel tracks? A. Yes, sir.

Q. Was your bell ringing? A. Yes, sir.

Q. You have an automatic bell, I believe? A. Yes, sir.

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(41)

Q. I understand that the flashlight was found about four feet north of Clopton Road? A. Yes, about four to six feet.

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(41-42)

Q. Did you see whether Mr. Dickens rode all the way into Clopton Road before he stepped off your cars or could you saw when Mr. Dickens stepped off the cars? A. Mr. Dickens stepped off the car on or near the crossing.

Q. On or near the crossing? A. Yes. He was supposed to look out for the safety part of that crossing until after it covered the crossing.

Q. And he kept all the way down to protect the crossing on that? A. Yes, sir.

Q. Was Mr. Tiller a large man? A. Yes, sir.

Q. Do you know what his weight was? A. Mr. Tiller was a heavy man, heavier than I am, and I weigh 203.

Q. You weigh 203 and Mr. Tiller was heavier than you? A. Yes, sir.

Q. Do you know what his height was? A. I am five foot eleven and I would say Mr. Tiller was about the same.

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(43-45)

REDIRECT EXAMINATION

BY MR. SATTERFIELD:

Q. That trainman was not at the rear end of your three cars, was he, when he gave you the signal to stop? A. He wasn't at the rear end when he gave me the signal to stop.

Q. Tell the jury where he was. A. He was near this highway crossing when he give me the signal to stop.

Q. He was beyond the front end of your locomotive going in the other direction, wasn't he? A. Yes, sir.

Q. Why was he going up to that end of the yard? What was he going to do? A. He was going up there after the yard force had made their classification and he would have to change the switch again in order to let me out of the slow siding.

Q. So the same gentleman who was on the rear end of your train as it backed up was the man who gave you the signal to stop after you had passed him and he was in front of your locomotive, south, was he not, of this road? He was down in the yard? You stopped your engine and your tender on the road, didn't you? A. Yes.

Q. Where was he? A. Mr. Dickens was on the north side of me when he give me the signal to stop.

Q. Were you still moving? A. When he give me the signal to stop I was moving on to him but you don't stop

right now. In other words, we were moving on in there slow and Mr. Dickens got off, you see, and give me the signal to stop.

Q. You stated a moment ago that Mr. Dickens got off at or near that crossing? A. Yes, sir.

Q. As your three cars and your engine and your tender went on north before you got the signal from him to stop, what part of your train was paralled with Mr. Dickens when he gave you the signal to stop? A. Mr. Dickens was about at the middle of the car next to the engine, north of me.

Q. When he gave you the signal to stop? A. Yes, sir.

Q. And you stopped? A. Yes, sir.

Q. And what did he do then? A. I stayed there.

Q. What did he do then—Mr. Dickens? A. Mr. Dickens come on then up to the switch at the slow siding.

Q. You mean these switches south of Clopton Road? A. That is right.

Q. I want to ask you, Mr. Myrick—you were sitting in the engineer's seat, I believe you stated to the jury, which would be on the left of your train in a back-up movement? A. Yes, sir.

Q. In front of you ordinarily there is nothing but the boiler of the locomotive when you are running head on? A. That is right, when you are head on.

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(45-46)

Q. When you are running head on you can see a good deal across and in front of your locomotive, can't you, when it is in a normal operations. A. Yes, sir.

Q. Will you state to the jury whether it is possible for you to do that when you have got the tender and three cars in front of you as you push up? A. Could I see Mr. Dickens?

Q. Can you see across the right-hand side of the tracks when you have got three coaches in front of you? A. No, sir.

Q. Mr. Dickens was on the side of the car, I believe you said, holding on to the step? A. Yes.

Q. When you say the center of the car, you don't mean he was around at the front end of the car? A. No, sir, the side step is on the side of the car.

Q. Do I understand you to say Mr. Dickens didn't go all the way across that road crossing? A. Mr. Dickens got off on or near the crossing.

BY THE COURT:

Q. While your train was being moved? A. Yes, sir.

Q. And where was he standing when he gave you the signal? A. He was on or near the crossing when he gave me the signal.

Q. Was he north or south of the crossing? A. You might say he was on the crossing.

Q. Where was he standing when your train came to a stop? A. He was standing practically at the same place that he gave me the signal to stop.

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(47)

RECROSS EXAMINATION

BY MR. DENNY:

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Q. You did not come to a stop, as I understand it, at the point you did stop because you had any knowledge or suspicion that anyone was hurt? A. No, I didn't have any idea anyone was hurt.

Q. It was just to clear the switch? A. The trainman evidently knowed I was in the clear when he stopped me at the point he wanted me to stop.

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(53-54)

ERNEST H. WAMACK, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

. . . . . .

Q. Are you in the employ of the Atlantic Coast Line Railroad Company? A. Yes, sir.

Q. In what capacity?

A. As a switchman.

Q. How long have you been in the employ of this company? A. 24 years.

Q. And as a switchman for how long? A. 24 years.

Q. Did you know the deceased, Mr. Tiller? A. Yes, sir.

Q. How long had you known him? A. I would say probably about eight years.

Q. Did you see the deceased, Mr. Tiller, on March 20, 1940, the day of this accident? A. Yes, sir.

Q. Where? A. I don't think that I saw him until after he was hurt. I spoke to him at the Byrd Street yard.

BY MR. DENNY:

Q. I couldn't catch that last. A. I spoke to Mr. Tiller at Byrd Street Station, at the freight station.

BY MR. SATTERFIELD:

Q. About what time? A. I imagine it would be around 6:15.

Q. That was before the yard engine had moved the train of freight cars, which is known as first section 209, out of Byrd Street Station? A. Yes, sir.

Q. Were you assigned as switchman on that first section of 209 the evening of the 20th of March, 1940? A. Out of Richmond, yes, sir.

. . . . . .

(54)

Q. That train that left with Mr. Tiller, was Mr. Linton the engineer of that train? A. Yes, sir.

. . . . . .

(56)

Q. Did you see Mr. Tiller? You said you never saw him until after the accident occurred? A. Not from the time I spoke to him in Richmond yard until after the accident occurred.

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(56-57)

Q. As your train came on the southbound rail it crossed over Clopton Road, didn't it? A. Yes.

Q. Were you still on the tender then? A. Yes.

Q. How far did you ride before you got off the tender? A. About two car lengths which would be about seventy feet.

Q. You stepped off then? A. Yes, sir.

Q. Did the train continue to move, the one on which you were riding southward? A. Yes, sir.

Q. Until how much, if any, of it had passed the Clopton Road? A. About 22 car lengths.

Q. And then what happened when 22 had passed? A. It stopped.

Q. How much of that did it leave of the train north of Clopton Road? A. I don't know exactly the number but I would imagine it would be around about 35 cars.

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(58-62)

Q. How many years have you been working for the company? A. I have been in train service 24 years. I have been with the company about 28 years altogether.

Q. During the time you have been in train service you have been frequently on that run or assignment, haven't you? A. Yes, sir.

Q. Have you seen Mr. Tiller on other occasions there in Clopton Yard checking car seals? A. Yes, sir.

Q. Night and day? A. Yes.

Q. Where would he usually stand to check them? A. In riding that train out there and observing Mr. Tiller and his movements in the past several years, I would say he would

always get off between the cross-over switch, as we call it, which would be probably 15 car lengths from Clopton Road crossing—anywhere from there up to the road crossing.

Q. Do I understand you to say in fixing the place where he usually alighted—you have not seen this? A. No, sir.

Q. This is the north side, the Richmond end, and this is the Clopton Yard office. Do you orient yourself? A. Yes, I think I have it.

Q. Will you show to the Gentlemen of the Jury the area within which he usually alighted from the train to make the car checks? A. All of this isn't on here. There is a cross-over switch that leads from here to the Clopton Road crossing. I observed Mr. Tiller would drop off anywhere below this switch up to the road crossing.

Q. Have you ever seen him use the road crossing to alight? A. Not paying any particular attention, I can't say that he alighted right on the crossing; somewhere about that. I am generally on the east side and he gets off on the west side.

Q. Have you seen him checking the slowing moving freight cars as they pass on southward, night and day? A. Yes, sir.

Q. How would he do it when it was dark? A. With a flashlight.

Q. Did you receive any instructions from the conductor of your train with reference to movements that would be necessary that night in the yard? A. I received instructions from the Yardmaster, W. J. Jones, that the move had to be made.

Q. Why was that move necessary? Did they tell you? A. They got a classification that was in the wrong classification that had to be classified.

Q. Translating that for the layman to understand it, do I understand you to mean they had a car in the wrong place that had to be put in the right place? A. Yes.

Q. You speak of a car in the wrong place as being badly classified or improperly classified? A. Yes.

Q. Do you recall to which place it was consigned, where it was going? A. I understand it was going to Jacksonville, Florida, the car that we cut in.

Q. The movement of that train which came in off the Meadow siding and which was under the operation of Engineer Myrick—did you see that train as it came backward on the slow siding with three cars in front of it in a back-up movement? A. I remember seeing it moving back. I think I went through from the east side to the west side to turn a valve that turns the air and I think while I was doing that he was backing down.

Q. You don't remember seeing him? A. I am pretty sure that I did see him in that movement, and we was making a movement at that time too.

Q. Mr. Wamack, in all your experience there in the yard was not that an unusual movement made by Engineer Myrick that night? A. No, I wouldn't say it is unusual. It has happened before.

Q. How often before? A. I wouldn't be able to estimate that but quite often we make that move.

Q. How often have you been on that particular run handling those trains 209? A. Ever since 1921.

Q. How many times in the last two or three years? Mr. Tiller was injured in 1940. Let us say for the years 1938 and 1939 or two years prior to 1940 how many times would you say a year that you were on that assignment? A. Well, I could easily estimate half of the time.

Q. Half of the time? A. Yes.

Q. How many times would you say per month you would make that move to get a car out of the wrong classification and use that slow siding in a back-up movement as Engineer Myrick did on that occasion? A. How many times would we make that movement?

Q. Per month that you would make that exact movement? A. We have about half of the time a classification to make on the two trains.

Q. I am not speaking about since 1940; I am speaking of

prior to 1940. A. I don't think I would be able to say as to how many times.

Q. I mean roughly, from your recollection, how many times would you say you would do it per month, the exact move that Engineer Myrick made on that evening, March 20, 1940, two years prior to 1940? A. I would say it may happen ten times a month or it may happen fifteen times per month or it may not happen in two months.

Q. Let us take it over a period of six months. Would you say it averaged more than three or four times a month or two or three times a month, year in and year out? A. Well, it would be hard for me to say.

. . . . . .

(63)

Q. (By Mr. Satterfield) How many times would you say it was done per year prior to the unfortunate accident that caused this man's death? A. Well, I tell you I don't think I could fairly answer that question and be anyways closely accurate about it.

Q. You don't think you could answer it accurately at all? A. No.

Q. Are you acquainted with the recent rules issued to you by the company in the bulletin book? A. Yes, sir.

Q. Was there a recent rule with reference to the flagging of crossings issued to you by the company? A. I think the company issued instructions somewhere, I will say, about two years ago.

Q. What was that rule with reference to crossings? A. With reference to protecting crossings when you have no other protection excepting you came up there with, say, a box car—

. . . . . .

(64)

A. I will say about two years, I think it is, that this bulletin was issued instructing the trainmen when they go over

a crossing that is not protected that they stop and flag over, protecting the public.

By Mr. Satterfield:

Q. What do you mean by "flag over"? What does that mean? A. That a trainman gets in the center of the crossing and it is clear and then he proceeds over.

Q. Proceeds all the way across the crossing? A. Yes, sir.

Q. And stops the train before it gets to the crossing? A. Yes, sir.

Q. And then flags it over, goes across the crossing and gets on? A. Yes, sir.

(64-68)

Cross Examination

By Mr. Denny:

Q. Mr. Wamack, does this rule or regulation that you just referred to apply to movements in a classification yard? A. Only at crossings.

Q. And it is for the benefit of the traveling public using the highway? A. Yes, sir, the rule was established for that.

Q. As I understand, for some years prior to Mr. Tiller's death you were on this run certainly fifty percent of the time, you think? A. Yes, sir.

Q. The yard engine goes out from the old Byrd Street Station, taking with it cars both for the freight train which you call First 209 and cars for the freight train which you call Second 209, does it not? A. That is right.

Q. First 209, which on this occasion was brought by Mr. Myrick from Acca, is a through fast merchandise freight, is it not? A. Yes, sir.

Q. And it takes only cars destined for Petersburg, Weldon and South Rocky Mount and points south of South Rocky Mount; is that correct? A. That is the general classification, yes.

Q. In other words, it does not carry with it any of the

local freight for stations between Richmond and Petersburg or between Petersburg and Weldon or between Weldon and South Rocky Mount? A. No, sir, that classification to Petersburg, Weldon and South Rocky Mount is the classification for First 209.

Q. Second 209 leaves later on in the evening carrying these local freights and less-than-carload lots, does it not? A. Yes, sir.

Q. So that when you go out of Byrd Street you have cars which are to go on the fast merchandise freight, known as First 209 and you also have cars to go on this local freight, which is known as Second 209, and when you get to Clopton Yards you have to take the cars that you have brought out and the cars of First 209 that comes from Acca and make up that fast merchandise freight to go south from Clopton Yards, do you not? A. That is correct.

Q. Is there anything unusual about you having to make classification movements over in Clopton Yards in cutting one train and putting it on another or shifting the position of a car? A. It is a daily occurrence.

Q. It generally occurs, does it not—a daily occurrence? That is what that yard is over there for, in part, to combine those two trains and make up the train that goes south, isn't it? A. That is what we use it for, yes, sir.

Q. On this particular night you came into Clopton Yards bringing this assortment of cars of which you have spoken, and as you approached Clopton Road, before you got to it, did the engineer have his train give his whistle signal? A. Correct.

Q. Did he ring his bell? A. The bell was ringing, yes, sir.

Q. Did he have an automatic bell? A. Yes, sir.

Q. I understand that you swung off the rear of the tender about two or three car lengths south of Clopton Road? A. That is right.

Q. Did you get off on the east or the west side? A. East side.

Q. Here is a picture, Mr. Wamack. This is south and

this is north, coming into Richmond. There are the stock yards and here is the track coming in from Acca up on the hill. You gentlemen, as I undestand it, came in on the southbound main line track, which is the center of these three tracks here, north of Clopton Road? A. That is right.

Q. And you stepped off on the east side or the Petersburg Turnpike side? A. That is right.

Q. And your train—not train because it was really a cut of cars that you were bringing—the cut of cars you were bringing out from Byrd Street kept on south and finally stopped with the engine perhaps 22 or 23 car lengths south of Clopton Road? A. That is right.

Q. I believe you said you received instructions from Mr. Jones to make a cut? A. That is ri at.

Q. How far south of Clopton Road was the point at which you had to make a cut in those cars? A. If this point is Clopton Road, I would say five car lengths above this.

Q. In other words, five car lengths south of Clopton Road is the point where you made the cut? A. Where we made the cut.

Q. After you made that cut did your engine, with the cars that were still attached to it, pull down to the south? A. Yes, sir.

Q. Had you been told what you were to do after you made that cut? A. Before I made that cut I was informed about cutting this car out—.

Q. Talk so the jury can hear you. A. When I dropped off here to make the usual cut of Second 209, I had to hold on to two more cars, being informed by Yardmaster W. J. Jones that we had a classification to make. So instead of making the cut where I was going to make it, I had to drop back two more car lengths.

. . . . . .

(69-71)

Q. What were you going to do after you made the cut? A. We made the cut here.

Q. That is south of Clopton Road? A. South of Clopton Road. First 209 out of Acca was holding this track.

Q. Up on the hill? A. Up on the hill just above this crossing. We cut off from here and go down to this cross-over, come back up to First 209 out of Acca standing here, coupled up one car and cut off.

Q. In other words, your engine was going to proceed south until it had cleared the switch so it could back up to join the cars left up on the hill? A. That was the movement.

Q. And it was your duty to go from the point on the southbound main line where you had made the cut over on the hill to couple up when your engine pushed that car back up there? A. That is right.

Q. On this occasion did you walk across to make that coupling or did you ride your cars down and then back up? A. I made the cut right here, five car lengths above this crossing. My conductor and the other switchman was at this cross-over switch.

Q. Further south of it? A. I walked over this way, that is to the west side, to see that this switch was lined up so that we could make this move up here.

Q. As soon as your engine and these lead cars had pulled out so as to permit you to walk over to the west side of the southbound main line, was slow siding clear or was any movement going on on slow siding when you crossed over to the west of the southbound main line? A. As well as I remember, when I crossed over here this man was backing down.

Q. You mean Mr. Myrick was backing into slow siding? A. First 209 out of Acca was backing down into slow siding.

Q. Carrying these three coal hoppers with it? A. I didn't know at that time what they had. I could only see the headlight of the engine.

Q. Did you have to stop there so as to let Mr. Myrick's engine and the cars he was pushing go by before you crossed over? A. As well as I remember, just as I walked around here, I think his engine was just clearing.

Q. From your testimony you were walking in a northwestwardly direction from the point where you had made the cut over to this point on the hill? A. That is right.

Q. You were on the east side of Mr. Myrick's back-up movement? A. At that time when I walked up—

Q. We are still down here. You crossed over the southbound main line? A. That is right.

Q. And you were going in this northwestwardly direction? A. That is right.

Q. You were between the slow siding and the southbound main line when you crossed over? A. Yes.

Q. Did you see any light or any movement of any kind of any person up to the north of you there at the point where Clopton Road crosses these tracks? Did you see anybody up there with a flashlight? A. I never noticed anyone or any move up there excepting the engine with its headlights because I was proceeding up here.

Q. You were proceeding over to get on the hill? A. To make a coupling.

Q. You were proceeding over to get on the hill? Did you see any reflection of a flashlight down there? A. No.

Q. Did you hear any cry or any unusual sound down there at the crossing? A. I never noticed anything unusual at all.

. . . . . .

(72-73)

Q. Mr. Wamack, I understand you to say that classification is a matter of daily occurrence? It takes place in the make-up of all freight trains? A. Yes, sir, that is our duty. That is my duty.

Q. Sometimes, depending upon what kind of cuts you have to make, you will use one set of tracks and other times you will use another set of tracks? Am I correct in that? A. That is right.

Q. Are you gentlemen constantly warned and instructed that when you are in a freight classification yard it is your duty to watch out for these shifting movements of trains

and to protect yourselves? Are those instructions given you? A. Yes, sir.

Q. There is nothing unusual in a classification yard about an engine pushing some cars as Mr. Myrick was pushing cars that night, is there? A. No, sir, that happens every day.

Q. They push cars almost as much as they pull them in classifying? A. Yes, sir.

Q. Is there any certainty in making a shifting movement in a classification yard that you will have a light on the head end? A. No, we don't carry any light or no protection. When we switch cars in a series of tracks there is liable to be three or four trains moving at the same time.

Q. You mean cars moving on three or four tracks at the same time? A. Yes.

Q. Every man who works around a freight yard knows that, doesn't he, of necessity? A. He should be acquainted with it, I think.

Q. Did Mr. Tiller, when he was on this run, always ride on your engine out from Byrd Street or did he sometimes come out to Clopton Yard by other means of locomotion? A. I have seen Mr. Tiller's car out there and I have seen him ride with Mr. Jones, the Yardmaster, and I have seen him use his car.

* * * * * *

(73-74)

Q. In other words, when you made up your cut of cars at Byrd Street to take out to Clopton, you didn't know whether Mr. Tiller was going to be on your cut or not, did you? A. No. The only way I would know he was on there, I would see him and sometimes he rode all over the train, from one end to the other. There was no particular place to ride and if I was on top I would probably see him or I may be on the engine and on the fireman's seat box which is the east side, and I might see him when he gets off over a period of time.

* * * * * *

Q. In the make-up of this train out of Clopton, from time to time have you seen Mr. Tiller down south of the railroad crossing? Have you ever seen him down south of the railroad crossing? A. Yes, I have seen Mr. Tiller all over the yard, from one end to the other.

Q. He didn't stay in one place, did he? A. I have seen him all over the yard—in other words, from the lower end of Clopton Yard all the way to Byrd Street Station.

• • • • • •

(77-79)

F. A. WILKINSON, a witness called by the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. MOORE:

Q. You are a section foreman for the Atlantic Coast Line Railroad Company, are you not? A. Yes, sir.

• • • • • •

Q. And what would be the distance between a train on the slow siding and one on the southbound main line if one of those trains had hopper cars in it?

• • • • • •

A. If one side had a hopper car, you would have three foot seven and one-half inches clearance.

Q. What would it be if both had hopper cars? A. You would have three foot three and one-half inches.

Q. That three feet three and one-half inches would be the distance between the two trains moving on parallel tracks? A. Yes, sir.

Q. Is there any street light at Clopton Road? A. No, sir.

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(79-81)

CROSS EXAMINATION

BY MR. TOWNSEND:

• • • • • •

Q. So you would have a clearance of four feet three and one-half inches, wouldn't you? A. That is right.

Q. Is that plenty of room for a man to walk between while the trains are going? A. Well, I will tell you they don't get much larger than I am and I walk through very handy.

* * * * * *

(81)

REDIRECT EXAMINATION

BY MR. MOORE:

Q. Mr. Wilkinson, would you stand in between those two trains, facing one of them, and hold out your arm and not watch the other one? A. Not if I knew the other one was coming.

(81)

RECROSS EXAMINATION

BY MR. TOWNSEND:

Q. Is that the ordinary and usual clearance between tracks? A. That is our standard—13 foot centers, from center of track to center of track.

(82-83)

R. L. DICKENS, a witness called on behalf of the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

* * * * * *

Q. How long have you been an employee of the Atlantic Coast Line Railroad? A. Five years this December.

Q. You were employed in January, 1937, weren't you? A. Yes, sir.

Q. In what capacity are you employed by the Atlantic Coast Line Railroad Company? A. As a brakeman.

Q. Are you a regular brakeman? A. No, sir.

Q. Were you a member of the train crew operating a

train of freight cars which left Acca on the evening of March 20, 1940? A. Yes, sir.

Q. Were you a brakeman on that train? A. Yes, sir.

Q. Were you the only brakeman on that train? A. I was the only brakeman.

. . . . . .

(84)

Q. Why did your train stop at Clopton Yards? A. For the purpose of picking up cars.

Q. Do you know how many tracks of the railroad company cross Clopton Road at Clopton Yards? A. I believe there are seven.

Q. How many cars were in the train that you came over on from Acca to Clopton? A. I disremember but there were approximately twelve or fifteen cars.

Q. How long have you been on this particular run? A. I have been over this run a number of times but there is no train crew assigned to that run regularly. You might catch that train once a week or you might go a month before you would catch it again. You might catch it twice a week.

Q. The times that you did serve on this particular train did it come over the Belt Line to Clopton Yard and on each occasion pick up cars for movement south? A. Yes, sir.

. . . . . .

(86-88)

Q. What movement, if any, was made by the engine which was operated by Engineer Myrick after you had gotten to your place up on the hill? A. I cut three cars off and we went on down the hill and backed up into slow siding.

Q. You cut three cars off. Do you mean by that you disconnected them from the other twelve or fifteen—whatever the other cars were in the train? A. Yes, sir.

Q. Which track were you on? This lower one? A. This track.

Q. You went on down into the yard until you could throw

a switch to bring you back into slow siding? A. I went down to approximately here and back on slow siding.

Q. How fast did it back? A. Oh, I would say four or five miles an hour.

Q. Where were you when it was backing in the direction of Clopton Road and before it got to Clopton Road? A. I was on the head of the leading car on the engineer's side, giving the signal.

Q. What sort of signal were you giving him? A. A back-up signal.

Q. What does that consist of? A. (Witness indicates with arm)

Q. Rotating the arm in a cirular motion horizontal with the ground? A. Yes, sir.

Q. What sort of a car were you riding on, approaching Clopton Road? A. I was riding on—you call it the end or side also. I was riding at the extreme northern end of the car on the side.

Q. What part of the car did you have hold of? A. The grab iron.

Q. Where were your feet? A. On the foot step.

Q. What kind of a car was that lead car? A. It was a coal hopper car.

Q. You were holding on with which hand? A. I presume I was holding on with my right hand and giving the signal with my left. That is the natural way I would hold.

Q. When you got to Clopton Road you could see that Clopton Road was blocked on the east by the train that was still moving southward down the yard, couldn't you? A. Yes, sir.

Q. So when you got to Clopton Road what did you do? A. When I got to Clopton Road I got off about the center of the crossing to protect the crossing from any other traffic.

Q. What did you do the minute you got on the ground? A. I let the cars roll back a little ways and then stopped the engineer and walked on up to proceed to throw my switch back.

Q. What do you mean by "up"? Do you mean you went southward toward Petersburg? A. Yes, sir.

Q. When you gave the signal to the engineer, Mr. Myrick, to stop, where was the engine—south of you or north of you, or whereabouts? A. I believe the engine was just about at me.

Q. And did he stop immediately? A. Yes, sir.

Q. And where was the engine with reference to this road when it stopped? A. If I am not mistaken, the tank was resting just about on the road, probably not completely over the road—the tank of the engine.

Q. Had such a shift as was made on the evening of March 20th by Mr. Myrick been made on this track on any previous occasion while you were serving as a brakeman on that train? A. I had never been in slow siding before.

* * * * * *

(89-90)

Q. When you stepped off of the step of the end of that coal car, by the time you had reached the ground, state to the jury where the end of the car was that you had just dismounted from? A. I don't know but we weren't moving fast and the car couldn't have been more than a few inches by me by the time I stepped to the ground.

Q. You said you were going four or five miles an hour? A. Yes, sir.

Q. By the time you got to the ground and had come to a standstill from the action on your part of dismounting, where would you say the end of the car was that you had just left? A. Mr. Satterfield, I usually keep a hand hold on the cars until my feet hit the ground and I realize I am not going to fall. Of course, at a speed of four or five miles an hour it wouldn't really be necessary to hold on but I really couldn't say how far the car had gone by me when I stopped.

Q. You were off in the middle of the road? A. Approximately in the middle of the road.

Q. You didn't go to the north side of the road? A. I should say that I probably did.

Q. You probably did? If I may demonstrate to you, I can show you what I mean.

Q. I don't know whether we can get your demonstration in the record, but you can tell it anyway. A. If I was to step off this car in the middle of the road I would probably—

By Mr. Denny:

Q. You mean you would probably take a couple of steps after you step off? A. Yes, sir.

* * * * * *

(92).

By Mr. Satterfield:

Q. Did you hear any whistle or bell sounded on the train in which you were riding? I mean Mr. Myrick's engine with the three cars? A. Mr. Satterfield, I am so accustomed to whistles and bells that they could probably have been ringing and I not paying any attention to them at all, but I can't honestly say a whistle or bell blew or rang because it is something that I wouldn't have paid a great deal of attention to at that time.

* * * * * *

(92-94)

Q. Was there any light on the car which was the lead car other than your lantern? A. No, sir.

Q. Was there any light on the end of the engine? A. Yes, sir.

Q. What kind of a light was it? A. A small electric bulb.

Q. That is located on what part of the apparatus? A. It is on top of the tank in the middle of the end. I don't know how to exactly explain it to you. It would be the center of the tank at the top on the end.

Q. Of the tender? A. Yes, sir.

Q. How many cars were between that light and the end of the back-up movement? A. How many cars between that light and the end of the back-up movement?

Q. Yes. A. I was holding three cars.

Q. How many cars were between that light and the end of that back-up movement? A. Two cars between the engine and the car I was riding on.

Q. I am not asking you about the car you were riding. How many cars were between the light you have just described to the Gentlemen of the Jury on the tender and the front end of that back-up movement? A. Three cars.

Q. How high are those cars, do you know? A. No, sir.

Q. Was there anyone else on the end of that back-up movement beside you? A. No, sir.

Q. Who ordered you to make that movement? A. The Yardmaster, Mr. Jones.

Q. You didn't get those instructions from your conductor? A. No, sir.

(94-97)

CROSS EXAMINATION

BY MR. TOWNSEND:

. . . . . .

Q. About how many times, do you suppose, in the three and one-half years that you had run on First 209? A. I can't answer exactly but I would say maybe a dozen or maybe twenty.

Q. Maybe a dozen or maybe twenty times in the three and one-half years? A. Yes, sir, or possibly just a few more times.

Q. Is it always necessary to shift cars when First 209 reaches Clopton Yard? A. It is always necessary to pick up cars and shift them back to our train.

Q. When you pick up cars there the movement of the road engine would be to get out of the way, wouldn't it? A. Would what?

Q. The movement of the road engine would be to get out of the way and let the yard engine put the cars of First 209 up to the cut on the hill? A. No, sir.

Q. What would be your movement? A. My movement when I arrive at Clopton—it all depends on what the cars from the freight house would consist of.

Q. That is what I am getting at. If there is no necessity for any classification, then all you have to do is get out of the way, get the road engine out of the way? A. If there was no necessity for classification?

Q. Yes. For instance, you would hold to the Weldon cars or you would hold to the Petersburg cars and go in one of the sidings there so as to let the yard engine make up the train, wouldn't you? A. No, sir. If there had to be classification, I would get out of the way. If there did not have to be any classification I would pick these cars up and set them to my train myself.

Q. Then there would be no occasion for any shifting. What portion of the time do you suppose there would be when there would be no shifting for First 209? A. I would say—when there wouldn't be any shifting?

Q. When there wouldn't be any shifting? A. Oh, a fourth of the time.

Q. And the road engine would simply attach to the train and go on off? A. A fourth of the time, approximately.

Q. But if there were shifting to be done, as I understand the make-up of First 209, you have the Weldon cars in front of the train, don't you? A. Yes, sir.

Q. Next to that comes what? A. Petersburg.

Q. Next to that the Petersburg cars and after that would come the cars for South of Rocky Mount? A. Yes, sir.

Q. So that if you came in with Petersburg cars and there were no Petersburg cars in the cut of cars that came from South Richmond, then there would be no occasion to do any shifting so far as Petersburg cars were concerned at all, would there? A. No, sir, I would just have to hold to my Petersburg cars and pick up.

Q. Hold to your Petersburg cars and pick up and the yard engine would put the rest of the cars that were brought in on First 209 to the cut that were to go? A. If I arrived

at Clopton with Weldon and Petersburg and through cars, and the yard engine has Petersburg cars and through cars for me, my move is to hold my Weldon cars and get out of the way. The yard engine would pick up what Petersburg cars I had.

Q. What cars you had or he had? A. That is, if I had Weldon cars, what Petersburg cars that I had he would set over to my pick-up. The yard engine would go on and I would come to the cars he brought and come back to my train.

* * * * * *

(98-100)

Q. Did the Yardmaster come to you there? Did you see the Yardmaster there? A. Yes, right in the vicinity of Clopton Road.

Q. And he told you to hold to three empty Petersburg cars and to go in slow siding? Yes, sir.

Q. And you went down below the switch, threw the switch, and gave your engineer the sign to back up into slow siding; is that right? A. Yes, sir.

Q. Did you see anyone or any light in the vicinity of Clopton Road when you were riding that cut of cars back up to the road? A. No, sir.

Q. Did you hear any outcry or hear any noise? A. No, sir.

Q. While you were doing that what movement was the yard engine and the cars it brought from Richmond making? A. When I was backing into slow siding?

Q. While you were backing into slow siding. A. The yard engine had cut off and it pulled down on the main line in order to make a switch to our train.

Q. I understand you to say that you got off of the lead car about the center of Clopton Road? A. Yes, sir.

Q. For what purpose were you riding that lead car back to Clopton Road? A. To protect the road crossing. I am getting my directions, east and west, mixed up—to protect my road crossing from traveling coming this way, westbound traveling.

Q. Coming from the west, you mean? A. Coming from the west, yes.

Q. As I understand you to say, the east side of the crossing was already protected by the cut of cars coming in from Richmond, was it not? A. Yes, sir.

Q. So that you wanted to protect your train from any traveling coming from the west. Would it have been necessary for you to have a lantern or to ride that cut of cars except for Clopton Road? A. No, sir, it wouldn't have been necessary for me to ride it back at all if it hadn't been for Clopton Road.

Q. Do you have to carry a lantern on the end of a cut of cars shifting in the yard at night? A. No, sir.

Q. Except at a road crossing? A. A lantern is used generally for a signal and I would have had a lantern that night to signal my engineer. That is a night signal, a white lamp, but I wouldn't have been on the cars riding back if it hadn't been for Clopton Road crossing.

* * * * * *

(100-102)

Q. In what direction were you facing when the backward movement was made over Clopton Road? A. North.

Q. You were facing north. How far is the grab iron and step from the end of the car, from the north end of that car? A. It is right on the extreme end of the car.

Q. And you were on the west side, the right-hand side of the car, and at the extreme end of the northernmost hopper car when you passed over the crossing? Is that right? A. Yes, sir, I was on the west side of the car, the extreme end.

Q. The west side of the car and the extreme north end of the box car? A. Of the hopper car.

Q. Were you giving that circular movement with your lantern, the back-up signal, until you got off the hopper car? A. Yes, sir.

Q. When you got off of the car you were facing north? A. Yes, sir.

Q. Did you or not take any steps further toward the north as you got off the car? A. There was just the slightest movement that would make me take a couple of steps.

Q. You would have to get off the car facing north, would you not, or you would be thrown? A. Yes, sir.

Q. If you attempted to get off the car toward the south you would be thrown? A. Yes, sir, more than apt to.

Q. So that you took several steps after you touched the ground along with the motion of the car? A. Yes, sir.

Q. You think then that you were near the north side of the road when you came to a standstill? A. I should say I was, yes, sir.

. . . . . .

(105-107)

RECROSS EXAMINATION

BY MR. TOWNSEND:

. . . . . .

Q. Is there any rule that you have ever heard of that required you to stop just before you got to Clopton Road? A. No, sir.

. . . . . .

BY THE COURT:

Q. I want to ask you a question, Mr. Dickens. After you had thrown the switch and boarded the train that was backing into slow siding, how far was the place that you boarded the train south of Clopton Road? A. Three or four car lengths.

Q. And how far is that? A. Approximately 100 feet or 120 feet.

Q. Was it dark? A. Yes, sir.

Q. Was there any light from the trains along the track at

all in front of the back-up movement that the train made? A. Nothing but my lantern in my hand.

(107-113)

P. W. WRIGHT, a witness called on behalf of the plaintiff and being first duly sworn, testified as follows:

EXAMINED BY MR. SATTERFIELD:

* * * * * *

Q. Mr. Wright, were you Engineer Myrick's fireman on the evening of the 20th of March, 1940? A. Yes, sir.

Q. Did you fire the road engine which he was operating out of Acca Yard for Meadow, Virginia? A. Yes, sir.

* * * * * *

Q. Who was in the engine? A. Mr. Myrick.

Q. You were on the fireman's side? A. Yes, sir, on my seat box.

Q. And he was on his side? A. Yes, sir.

Q. Who was handling the front end of that back-up movement of those three cars? A. Mr. Dickens, our brakeman.

Q. Was he or was he not on your side of the train? A. He was on the engineer's side. The engineer was handling all the signals.

* * * * * *

Q. When you came to a standstill were you still on the fireman's seat? A. Yes, sir.

Q. What happened then? A. I saw a little beam of light just the other side of the road crossing and I thought probably it was a car sitting over there shining its light through the brake rigging.

Q. Over on the left-hand side? A. Yes, and I walked over on the engineer's side and looked out and there wasn't a car there. We were stopped at that time and I got up and walked over to the engineer's side and I had a flashlight in my pocket in my overalls and I got down on my side and walked back on the road crossing and shined my light down there and I seen a flashlight. Well, I shined it up a little farther and I seen a man's cap, so I turned around and went back to the engine to get Mr. Myrick and tell him what I had seen and Mr. Myrick got down off the engine and I handed Mr. Myrick my flashlight.

Q. How far from that road did you find that flashlight? A. Just a few inches, just this side of the embankment there.

Q. Come here and point to the jury where you saw it. A. As I remember, this is slow siding and this is southbound and it was laying right there.

Q. Just a few inches from the southbound line of the road? A. Yes, sir.

Q. Was it lit? A. Yes, sir. A little beam of light showed about eighteen inches long.

Q. Did I understand you to say it was between the southbound track and the slow siding? A. Yes, sir.

Q. How far on then did you find the cap? A. I don't know exactly. It was underneath the second car that we had hooked up, underneath the middle car.

Q. Did you find any other property? A. It was laying on the end of the cross ties and his gun was laying up further, between that and the rear of the train.

Q. How long have you been working with the railroad company? A. Since February 11, 1937 is my seniority date.

Q. You have been working for them since 1937? A. Yes, sir, off and on.

Q. Did you just begin to work for them in 1937? A. Yes, sir. Well, I worked in the shops for a couple of months.

Q. I mean on the road? A. That is right.

Q. When you got back to the end of the car did you see Mr. Tiller? A. Mr. Myrick and myself both, when we went

back there, Mr. Tiller was there but I didn't go back there by myself.

Q. Later on did he make any statement in your presence there where you found him? A. Yes. He asked me what hit him and he asked me who I was and I told him and that is all that I remember. He asked me when the ambulance was coming and I told him they had ordered one and it would be here right away, I thought.

Q. At the times that you have been assigned to that run in handling that particular assignment on that train as fireman, have you ever made that same back-up movement that was made on March 20th? A. No, sir, I had always got in the clear on the south side.

Q. You had always got in the clear on the south side of this road? A. Yes, sir, down beyond the cross-over.

(113-116)

CROSS EXAMINATION

BY MR. DENNY:

* * * * * *

Q. You had been working just about three years at the time of this accident? A. Well, yes.

Q. How many times during that three years would you say that you had been assigned to this run that you were on that night? A. Up until the time of the accident?

Q. Yes. A. Not more than twelve or fifteen times at that time, I don't believe. I had never been through there more than fifteen or twenty times. I don't believe I had been through there more than five or six times in the past year.

* * * * * *

Q. As you were making that back-up movement I suppose you had been facing to the north? A. That is right.

Q. Did you see any light or any beam of light around

the crossing before you came to a stop? A. No, sir, I didn't see a thing.

Did you see anything that caused you to think a man might be down there turning a flashlight on and off? A. No, sir.

Q. Did you hear any outcry back there behind you? A. No, sir, I didn't hear anything unusual.

Q. There was nothing there? In sitting in the position you were in your cab you can see down the area between the cars on slow siding and the cars on the southbound main line, can you not? A. Yes, sir. We have the distance between the tracks of four feet, I think.

Q. There was nothing there to obstruct your vision? A. No, sir.

Q. And I understand you to say as you were making that movement you were looking down in that direction? A. Yes, sir.

Q. Was your bell ringing as you were backing up? A. Yes, sir.

Q. Is that an automatic bell? A. Yes, sir.

* * * * * *

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(122)

BURTON A. ANGLE, a witness called by the plaintiff and being first duly sworn, testified as follows:

* * * * * *

(124-127)

CROSS EXAMINATION

BY MR. TOWNSEND:

Q. Mr. Angle, what are your duties or what are the duties of a Special Officer of the railroad? A. Our main duties in railroad yards are to protect the merchandise, police our trains.

Q. Police the trains? A. Yes.

Q. Where do you ride? Where do the men ride on these freight trains? A. We don't have any particular place to ride. We ride most any place on the train.

Q. Do you ride on top of the train? A. On top, in box cars and occasionally on the engines.

Q. Within the last fifteen years have you ridden first section of 209 at times? A. Yes, sir.

Q. Can you say how often? A. No, I couldn't say how often. I rode occasionally. For the last eight years I have just been riding it occasionally.

Q. About eight years ago? A. About eight years ago I was assigned to ride it for a while regularly. I rode it for a month at a time.

Q. Have you ridden it at times with Sergeant Tiller? A. Yes, sir.

Q. Have you at times seen the road engine of First 209 back into slow siding? A. I have noticed it back in there. I couldn't say just how many times. I have noticed them backing those cars.

Q. Are you ever told about the switching movements in advance of when they are made? A. No, sir.

Q. What are the duties of the Special Officers as to taking care of themselves on the yard? A. Well, we have to look out for ourselves on the yard, looking out the best we can.

Q. Does anybody know where you are when you are riding on the train? A. Not at all times.

Q. Do you sometimes ride the trains when you don't want anybody to know where you are? A. Sometimes we are assigned to ride them and nobody is supposed to know where we are.

* * * * * *

Q. What clothes did he have on? A. Mr. Tiller was dressed for the winter. He had on his leather coat, outside coat, as near as I can remember, and then he had on a

leather vest and he had a vest under that and one of these heavy lumber shirts and heavy underwear.

Q. What else did he have on, if anything. A. I don't recall whether an overcoat or not. It seems to me he had an overcoat on but I wouldn't like to say about the overcoat.

Q. Did he have on heavy or light underwear? A. He had on heavy underwear.

Q. Do you know how long Sergeant Tiller had been running on this run regularly? A. Sergeant Tiller had been with the company sixteen years and I think most of that sixteen years was riding that train, 209.

Q. How would he get down to Clopton Yard usually? Would he ride the train? A. Yes, sir.

Q. Did he go other ways sometimes? A. Occasionally.

Q. Would he ever ride it from Acca? A. I wouldn't say. I know he has rode it from Acca but I don't know how many times.

(127-130)

MR. SATTERFIELD: We have a document we wish to present and we ask to introduce in evidence a certificate at this point.

THE COURT: Is there any objection? Have you shown it to the other side?

MR. MOORE: They have copies of it.

MR. SATTERFIELD: It has already been referred to.

THE COURT: Gentlemen, you may step out in the hall.

NOTE: The jury retired.

THE COURT: Do you gentlemen wish to be heard any further on the admission of this paper?

MR. DENNY: I think Mr. Townsend fully covered our point. The Virginia Statute requires the report and the Federal Statute requires a report and the Federal Statute says that the report made to the Federal Government shall not be admitted. I see no reason for going further unless your Honor wishes to hear it.

THE COURT: The objection is overruled and the statement is admitted in evidence. Your objection is not as to the form of it?

MR. DENNY: Our objection is not to the form. Our objection is to the competency and materiality of it.

MR. MOORE: I wanted to call attention of the Court to this: Mr. Denny has agreed to stipulate, for the purpose of the trial, that this report was made by Mr. J. A. Wall, I think the name is, who is Superintendent of the transportation branch of the Atlantic Coast Line Railroad, that it is a report by him acting within the course of his authority for the company, and so forth.

MR. DENNY: It is a report signed by Mr. Wall who occupied that position.

THE COURT: It is received and the stipulation is made a part of the record.

MR. DENNY: It is understood, of course, that stipulation simply goes to the authenticity of the paper and does not go to the question of materiality of competency.

* * * * * *

THE COURT: It will be received and you except?

MR. DENNY: Yes, sir.

* * * * * *

(131-132)

MR. SATTERFIELD: We rest at this point.

MR. DENNY: We have a motion we would like to make in the absence of the jury.

(The jury retired.)

MR. DENNY: If the Court please, I wish to move that the evidence be stricken or that we be awarded a directed verdict in favor of the defendant for the following two reasons:

The evidence discloses no actionable negligence on behalf of the Atlantic Coast Line Railroad Company, its officers, its agents or servants.

Secondly, the manner in which the plaintiff's decedent came to his death is purely a matter of speculation, conjecture and random judgment.

THE COURT: What was the second?

Mr. DENNY: That what Mr. Tiller was doing at the time of his death was purely a matter of conjecture, speculation and random judgment. We know he was run over but under what conditions we do not know. I think our motion is sound on both grounds.

. . . . . .

(141)

DIRECTED VERDICT OF THE COURT

THE COURT: Gentlemen of the Jury, the defendant has moved the Court to direct the jury to return a verdict for the defendant. This motion the Court has granted and the Court has directed the Clerk to write a verdict finding for the defendant, and I ask that you designate one of your members to sign that verdict as foreman.

Report of Accident resulting in injury to persons, equipment or roadbed.

(State Corporation Commission)
(April 24, 1940)
(Va.)

PLAINTIFF'S EXHIBIT NO. 3

To the Honorable State Corporation Commission,

RICHMOND, VIRGINIA.

The Atlantic Coast Line Railroad Company makes the following

REPORT OF AN ACCIDENT

which occurred near Clopton, Virginia, Station on the 20th day of March, 1940, at 7:15 o'clock P. M.

Nature of Accident

Police Officer of the Railroad Company struck and partly passed over by freight car in yard.

Name of Each Person Injured and Nature and Extent of Injury.—J. L. Tiller, white, 52 years of age, Police Sergeant of the ACL RR Co., went with yard engine taking cut of cars to Clopton, Va., to be placed in freight train stepped off engine upon arrival and was looking over the cars as they passed. He was standing on adjoining track for this purpose when road engine with several cars ahead of engine backed into this track. He was struck by the first car and dragged several feet receiving injuries which resulted in death in Grace Hospital, Richmond, Va., at 4:25 A. M., March 22nd, 1940.

Damage to Equipment

None

Damage to Roadbed

None

(Sign Here) J. A. WALL

(Title) Superintendent Transportation

To be forwarded to State Corporation Commission at end of calendar month, with abstract of all accident reports to that Department for such month.

COMMONWEALTH OF VIRGINIA

(Seal of Virginia)

DEPARTMENT OF THE

STATE CORPORATION COMMISSION

I, N. W. Atkinson, Clerk of the State Corporation Commission do hereby certify that the foregoing is a true copy of report filed by Atlantic Coast Line Railroad Company covering an accident on March 20, 1940, which resulted in the death of J. L. Tiller.

In Testimony Whereof I hereunto set my hand and affix the Official Seal of the State Corporation Commission, at Richmond, this 28th day of August, A.D. 1941

(Seal of State Corporation Commission)

(Sgd) N. W. ATKINSON,

Clerk of the Commission.

ORDER OF FINAL JUDGMENT

(Entered and filed October 6, 1941)

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, PLAINTIFF,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia corporation, DEFENDANT.

CIVIL ACTION FILE NO. 129.

Upon consideration of plaintiff's motion to set aside the verdict of the jury and to award her a new trial upon all issues, it is ordered that said motion be, and is hereby overruled, and that judgment be entered for defendant on the verdict of the jury, to all of which plaintiff, by counsel, excepted.

(Sgd) ROBERT N. POLLARD,

United States District Judge.

E. H. Wamack,

Direct:

[fol. 70] Q. What part of the train did you occupy as you went over to Clopton Yard?

A. I was riding on the engine.

Q. Who was in the engine with you, Mr. Wamack, do you remember?

A. I wasn't in the engine. I was on the rear of the engine which is known as the tender,—Mr. King, Mr. Elkie and myself.

Q. Mr. King, Mr. Elkie and you and Mr. Linton, the engineer, of course, and who was the fireman?

A. Cole, T. A. Cole.

Q. Who was on the rear end of your train?

A. There wasn't anybody on the rear end of the train.

Q. Nobody?

A. No.

Q. You were all in the cab?

A. No, we was on the tender on the back of the engine.

Q. When you say on the tender, do I understand you to mean that little passage way that is not in the cab but between the cab and where you get the coal?

A. The tender carries the water and we were on the south end of it. There are foot board steps that you ride on and also a hand rail.

Q. What we laymen would call the rear end of the engine and tender you were riding on, the step that goes across the back of the tender?

A. That is right.

Q. You and Mr. Elkie were on that?

A. We was on the rail—Mr. Elkie, Mr. King and myself.

Q. All three of you?

A. Yes, sir.

Q. Did you see Mr. Tiller? You said you never saw him [fol. 71] until after the accident occurred?

A. Not from the time I spoke to him in Richmond yard until after the accident occurred.

[fol. 72] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4909

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

February 4, 1942, the transcript of record is filed and the cause docketed.

Same day, the original exhibits are certified up.

February 6, 1942, the appearance of J. Vaughan Gary and Richmond Moore, Jr., is entered for the appellant.

Same day, the appearance of J. M. Townsend and Collins Denny, Jr., is entered for the appellee.

Same day, stipulation to continue case to the April Term, 1942, is filed.

ORDER CONTINUING CASE TO APRIL TERM—Filed February 9, 1942

(Style of Court and Title Omitted)

Upon the Joint Stipulation of the parties, by their respective counsel, and for good cause shown,

It is Ordered by this Court that the above entitled cause be, and the same is hereby, continued from the Term beginning March 9, 1942, to the Term beginning April 13, 1942, of this Court, and that the appellant do file her brief in the Office of the Clerk of this Court on or before March 10, 1942, and that the appellee do file its brief in the office [fol. 73] of the Clerk of this Court within four weeks thereafter.

Armistead M. Dobie, U. S. Circuit Judge.

February 7, 1942.

Endorsed: "We ask for this Richmond Moore, Jr., Counsel for Appellant. Collins Denny, Jr., Counsel for Appellee."

February 13, 1942, statement under section 3 of rule 10 is filed. Service accepted.

March 9, 1942, joint appendix to briefs of respective parties is filed.

Same day, brief on behalf of the appellant is filed.

April 3, 1942, brief on behalf of the appellee is filed.

April 10, 1942, reply brief on behalf of the appellant is filed.

ARGUMENT OF CAUSE

April 13, 1942, (April term, 1942) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 74] OPINION—Filed May 19, 1942

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4909

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellant,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond

(Argued April 13, 1942. Decided May 19, 1942)

Before Parker, Soper and Dobie, Circuit Judges

Richmond Moore, Jr. and J. Vaughan Gary for Appellant, and Collins Denny, Jr., and J. M. Townsend for Appellee.

[fol. 75] SOPER, Circuit Judge:

John Lewis Tiller, a sergeant of police in the employ of the Atlantic Coast Line Railroad Company, was fatally injured while on duty at 7 P. M. on the evening of March

20, 1940, when he was struck by a railroad car in the Clopton Yard of the Railroad Company near Richmond, Virginia. Upon the trial of the suit by his executor against the Railroad Company for damages for his death under the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of August 11, 1939, 45 U. S. C. A. 51, et seq., the District Judge directed a verdict for the defendant upon the ground that the evidence disclosed no negligence on the part of the carrier. The case largely turns on the meaning of the amendment of 1939 whereby § 4 of the Act was changed to add the provision that in any action under the Act to recover damages for the death of an employee, the employee shall not be held to have assumed the risk of his employer's negligence. See 45 U. S. C. A. 154. It is the contention of the appellant that by reason of this amendment the carrier may no longer rely upon the rule that as employees in railroad yards are aware that cars and engines move in all directions at irregular intervals, they assume the risk and must be on the lookout for their own safety so long as the movement is not unusual.

The defendant carrier operates each evening a freight train from Richmond to the south in two sections. Cars from the north are assembled at the Acca Yard of the Richmond, Fredericksburg & Potomac Railroad, and brought thence by a road engine to the Clopton Yard on the south side of the James River. Richmond cars are assembled at Byrd Street Station of the carrier, on the north side of the river, and are taken thence to the Clopton Yard. These cuts of cars arrive about the same time and are there as- [fol. 76] sembled for further transportation in such order that they may be conveniently dropped off at divers southern points.

Running through the Clopton Yard from east to west is the Clopton Road that is open to the public. Coming from the north of the road are three parallel tracks, of which the easternmost is the northbound main line, the center the southbound main line, and the westernmost is known as the slow siding and is used for shifting operations. Coming in from the northwest are the tracks from the Acca Station which also cross the Clopton Road to the west of the slow siding and connect with it south of the road.

Tiller had been in the employ of the Railroad Company for sixteen years, and was familiar with the layout of the tracks in the Clopton Yard and with the operation of the cars and the make-up of the trains. It was his duty as a member of the police force to guard the merchandise in the trains, to inspect the seals on the cars, and in the performance of his duty he rode the trains at such places as he saw fit. He followed no regular routine in coming to the Yard to police this particular train. He was seen at the Byrd Street Yard before the cars left that point on the night in question, and it is a fair inference that he rode on the cars from Byrd Street to Clopton Yard, although no one saw him on the cars or knew where he rode. He likewise followed no routine in checking the seals on the cars but did this work in various places in the yard.

The assembly or classification of the cars in making up the train requires the shifting of the cars back and forth, and employees, including police officers within the yard, are instructed that they must watch out for the movement of the trains as no employee watches out for them and no lights are used at night on the head end of [fol. 77] back-up movements except when an employee is placed at the back end with a lantern to protect a road crossing.

On the night in question, the cars from the Acca Station came into the Clopton Yard from the northwest, and the engineer was instructed to cut off three cars from his train and to go southwardly across the Clopton Road until he reached the slow siding and then to back up on the slow siding northwardly. These movements were made. In the meantime the cars from the Byrd Street Station had come south on the southbound main line. The evidence indicates that Tiller was standing on the slow siding, or between the slow siding and the southbound main track, inspecting the seals on the cars from Byrd Street that were on the southbound main track. He was struck a short distance north of the Clopton Road by the back-up movement of the cars from Acca Station on the slow siding. While no one saw the accident, this account is justified by the finding of Tiller's flashlight a few feet north of the Clopton Road and the finding of his cap and his pistol at intervals a few feet further north, and finally by finding him under the wheels on the east side of the rear end of the head car. The brakeman on the car in the back-up movement was

riding on the west side near the end of the head car holding a lantern with which he gave signals to the engineer as they approached the Clopton Road, but it was his duty to look out for traffic on the Clopton Road and he did not see Tiller standing to the east of the train. The automatic bell on the engine attached to the cars in the back-up movement was ringing at the time.

The distance between the western rail of the southbound main line track and the eastern rail of the slow siding was 7 feet 11½ inches. This distance was reduced by the overhang of the cars moving in opposite directions on the [fol. 78] two tracks to 3 feet 7½ inches, so that there was sufficient room for a man to stand in safety between slowly moving cars on the two tracks; but it is probable that Tiller did not hear cars approaching on the slow siding from the south.

There was some evidence on the part of the plaintiff that there was an error in the classification of the cars at Byrd Street, which necessitated the classification at the Clopton Yard. There was also evidence on the part of employees on the cars from the Acca Yard that they had not made this particular movement on prior occasions. But these employees had been on this particular run for only a few times in several years, and the evidence as a whole leaves no doubt that the Clopton Yard is a classification yard and that movement on the slow siding was in no sense unusual. It follows that the case presents no exception to the rule concerning the duty of railroad employees in freight yards to look out for their own safety, and the question for determination is whether this rule has been modified by the amendment of 1939 to the Employers' Liability Act.

Prior to the amendment of §4 of the Act, it was well settled that carriers had the right in actions under the Act for damages to rely upon the defense that their employees assumed the ordinary risks of their employment. This right was limited only by the provision of §4 that the employees should not be held to have assumed the risks of their employment in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee. Specifically it was held that in the movement of cars in a railroad yard by day or by night a carrier was under no duty or obligation to look out for the employees

within the yard or warn them of the approach of cars in [fol. 79] the ordinary manner by the blowing of whistles, the ringing of bells or the display of lights or otherwise.

Thus, in *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, 168, 169, 170, 171, in the case of a car checker, it was said:

"The plaintiff cannot recover in the absence of negligence on the part of the defendant. Seaboard Air Line v. Horton, 233 U. S. 492, 502. And, except as specified in §4 of the Act, the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees. Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, 445; Ches. & Ohio Ry. v. Nixon, 271 U. S. 218."

"• • • The work of checking cars in a yard at night where switching is being done is necessarily attended by much danger. But fault or negligence may not be inferred from the mere existence of danger or from the fact that plaintiff was struck and injured by the moving car. Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. Missouri Pacific Railroad Co. v. Aeby, 275 U. S. 426."

"• • • On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of [fol. 80] the shunted car. Aerkfetz v. Humphreys, supra." (145 U. S. 418.)

And in *Missouri Pac. R. R.* v. *Aeby*, 275 U. S. 426, in the case of an employee slipping on ice on a station platform, the court said: (pp. 429, 430)

"Under the circumstances, it cannot reasonably be held that failure of petitioner to remove the snow and ice violated any duty owed to her. The obligation in respect of

station platforms and the like owed by carriers to their passengers or to others coming upon their premises for the transaction of business is greater than that due their employees accustomed to work thereon. The reason is that the latter, familiar with the situation, are deemed voluntarily to take the risk of known conditions and dangers. Tuttle v. Milwaukee Railway, 122 U. S. 194. The facts of this case, when taken most favorably to the respondent, are not sufficient to sustain a finding that petitioner failed in any duty owed to her."

To the same effect were *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 420; *Ches. & Ohio Ry.* v. *Nixon*, 271 U. S. 218, 219; *Delaware, &c. R. R. Co.* v. *Koske*, 279 U. S. 7, 11; *Southern Ry Co.* v. *Verelle*, 4 Cir., 57 F. 2d 1008; *Fernald* v. *Boston & M. R. R.*, 2 Cir., 62 F. 2d 782; *Norfolk & Western R. Co.* v. *Collingsworth*, 6 Cir., 32 F. 2d 561; *Connelly* v. *Pennsylvania R. Co.*, 3 Cir., 201 F. 54.

These decisions clearly show that liability on the part of the carrier was denied because it was guilty of no neglect in failing to safeguard the injured employee from the ordinary risks of the business; and the reason given was that the employee assumed the risks and in effect agreed to look out for himself. The appellant claims that this situation is now changed by the addition to §4 of the provision that "such employee shall not be held to have assumed the risks of his employment in any case where such injury [fol. 81] or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." The argument is that as the doctrine of the assumption of the risk has been abolished in this respect, the carrier can no longer interpose it as a shield against the consequences of its neglect and hence is liable for injuries to its employees in its railroad yards or elsewhere, unless it takes precautions for their safety commensurate with the danger that they are likely to encounter.

Superficially considered, the argument seems to follow a logical sequence; but it loses its force when the true nature of the doctrine is understood. It is necessary to bear in mind that the phrase "assumption of the risk" is used in more than one sense and that it is not true to say, as the appellant's argument implies, that in every case where the doctrine was formerly applicable, there was negligence on the part of the employer. The truth is that there may be assumption of the risk by an employee with-

out negligence either on his part or on the part of his employer. At common law a master was not responsible to his servant for injuries which did not flow from the master's neglect but were inherent in the nature of the business. The risk of these dangers the employee assumed, and it was in this sense that the phrase was originally used. So it was said in the quotation from *Missouri Pacific R. R.* v. *Aeby*, 275 U. S. 429, 430, above set out, in explaining the greater obligation owed by a railroad carrier to its passengers than to its employees, "the reason is that the latter, familiar with the situation, are deemed voluntarily to take the risk of known conditions and dangers."

But there is another sense in which an employee is said to assume the risk, that is, when he has knowledge that his safety is endangered by some neglect on the part of [fol. 82] his employer and nevertheless continues to work without complaint and without promise of repair or remedy. Not long after the Employers' Liability Act was passed, it was argued on behalf of a railroad employee in a Virginia case, *Southern R. Co.* v. *Jacobs*, 116 Va. 189, that the defense of the assumption of the risk in the last mentioned sense was no longer available to a railroad carrier, and that the Act was intended to be punitive of negligence and did not cast on the employees of a carrier an assumption of the risk of any condition caused by the carrier's neglect. But this contention was rejected by the Virginia court; and its decision was affirmed in *Jacobs* v. *Southern R. Co.*, 241 U. S. 229, 234, where it was pointed out that the defense was abolished by §4 of the Act only where the negligence of the carrier is in violation of some statute enacted for the safety of employees, and that the defense was still available not only as to "the ordinary risks inherent in the business—the unavoidable risks which are intrinsic notwithstanding the performance by the carrier of its personal duties", but also as to "the secondary and ulterior risks arising from abnormal dangers due to the employers' negligence." See also, *Boldt* v. *Pennsylvania R. R. Co.*, 245 U. S. 441; *Delaware, &c. R. Co.* v. *Koske*, 279 U. S. 7.

It was to cut off this right of the carrier to avoid the consequences of its own neglect and in recognition of the needs of employees exposed to the grave hazards of railroading that the amendment of 1939 was enacted. Under the section

in its original form the carrier had been exculpated from liability in such a hard case as *Hallstein* v. *Pennsylvania R. R. Co.*, 6 Cir., 30 F. 2d 59, where an employee was held to have assumed the risk of his employer's failure to furnish a safety belt although he had demanded it and pro-
[fol. 83] ceeded with the work only when threatened with discharge. This case was mentioned in Report No. 661 of the Senate Committee on the Judiciary of the 76th Congress, 1st Session, of June 22, 1939, as illustrating an exceptionally harsh feature of the rule which it was desired to eliminate; and it is clear from the report as a whole that the purpose in mind was to enlarge the employees' protection by providing that in all cases in which injury results from the negligence of an employee or fellow servant, the defense of assumption of the risk should no longer be available, and at the same time to retain the provision of the existing law that the employer should be deprived of the defense if the violation of any safety statute should contribute to the injury of an employee.

It is significant that Congress made no provision in the amendment with respect to the other risks to which railroad workers are exposed, namely, the ordinary risks inherent in railroading despite the use of the required safety appliances and the exercise of due care by a carrier for the protection of its men. The amendment speaks only of injuries resulting from the carrier's negligence, and does not attempt to raise the standard of care required of a carrier with respect to the safety of its employees in the performance of their duties in railroad yards and other places of danger. The omission is especially noticeable in view of the pains which Congress has taken from time to time in the passage of statutes for the protection of railroad employees. See the *Safety Appliance Acts*, 45 U. S. C. A. §§ 1-16. The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, the doctrine
[fol. 84] of the assumption of the risk must be given its accustomed weight. It is beyond the power of this court to deny the defense in this case. It presents no material difference of fact from situations considered by the courts in numerous decisions and held to be free from negligence

on the part of the carriers, and we have no authority to prescribe new standards of conduct in the important field of railroad operations. See *Delaware, &c. R. Co.* v. *Koske*, 279 U. S. 7, 11; *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 170.

Affirmed.

[fol. 85] JUDGMENT—Filed and Entered May 19, 1942

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4909

HATTIE MAE TILLER, Executor of the Estate of John Lewis Tiller, Deceased, Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Virginia Corporation, Appellee

Appeal from the District Court of the United States for the Eastern District of Virginia

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

June 15, 1942, petition of appellant for a stay of the mandate is filed.

ORDER STAYING MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed and Entered June 15, 1942

(Style of Court and Title Omitted)

Upon the Application of the appellant, by her counsel Richmond Moore, Jr. and J. Vaughan Gary, and for good [fol. 86] cause shown,

It Is Ordered that the mandate of this Court in the above-entitled case be, and the same is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Senior Circuit Judge.

June 15, 1942.

July 13, 1942, petition for further stay of the mandate is filed.

ORDER FURTHER STAYING MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI—Filed July 17, 1942

(Style of Court and Title Omitted)

Upon the Application of the appellant, by her counsel Richmond Moore, Jr. and J. Vaughan Gary, and for good cause shown,

It Is Ordered that the mandate of this Court in the above-entitled case be, and the same is hereby, further stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

July 15, 1942.

John J. Parker, Senior Circuit Judge.

[fol. 87] STIPULATION AS TO RECORD FOR USE IN SUPREME COURT—Filed July 31, 1942

(Style of Court and Title Omitted)

It is hereby stipulated and agreed between counsel for the parties hereto that both for the purpose of consideration of the petition for writ of certiorari and for the hearing in event the petition for writ of certiorari is granted, the cer-

tified transcript of the record and the printed record shall consist of the following:

(1) The joint appendix to the briefs of appellant and appellee filed in the United States Circuit Court of Appeals for the Fourth Circuit in this action.

(2) The pleadings and orders in the United States District Court for the Eastern District of Virginia in this action.

(3) The proceedings in and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in this action.

(4) Pages 55 and 56 of the court reporter's transcript of the evidence in the District Court of the United States for the Eastern District of Virginia in this action, beginning with the second question on page 55 and ending at the conclusion of the fourth answer on page 56.

(5) This stipulation.

It is further stipulated and agreed that the original of plaintiff's exhibit No. 2 shall be certified to the Supreme Court of the United States and filed in this case in that court.

[fol. 88] Dated at Richmond, Virginia, this 31st day of July, 1942.

Richmond Moore, Jr., J. Vaughan Gary, Counsel for Appellant. Collins Denny, Jr., Counsel for Appellee.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the stipulation of counsel for the respective parties for use in the Supreme Court of the United States on an application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 4th day of August, A. D., 1942.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

(1580)

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 46,797. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 296. Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, Deceased, Petitioner, vs. Atlantic Coast Line Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed August 12, 1942. Term No. 296, O. T. 1942.

Office - Supreme Court, U. S.
FILED
AUG 12 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. VAUGHAN GARY,
RICHMOND MOORE, JR.,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, Deceased, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in this case on May 19, 1942.

A.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 19, 1942 (R. 77). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; U. S. C., Title 28, Sec. 347 (a).

B.

Questions Presented.

1. Whether in an action under the Federal Employer's Liability Act of April 22, 1908, as amended by the Act of August 11, 1939, by the executor of a deceased railroad employee against the railroad for damages for his death resulting from fatal injuries sustained by him while working in the railroad's yard, there was sufficient evidence of negligence on the part of the carrier for the case to be submitted to the jury.

2. Whether by reason of the amendment to the Federal Employer's Liability Act to the effect that in an action under that Act the employee shall not be held to have assumed the risk of his employer's negligence, the carrier may no longer rely upon the former rule that its employees in railroad yards assume the risks of all usual yard movements and must look out for their own safety, and, therefore, must take precautions for the safety of its employees in its railroad yards commensurate with the dangers involved.

3. Whether there was sufficient evidence of an unusual movement by the train which struck decedent for the case to be submitted to the jury on that issue, the case of an unusual movement, prior to the amendment above referred to, constituting an exception to the former rule.

C.

Statement of the Matter Involved.

The decedent, John L. Tiller, a sergeant of police of the Atlantic Coast Line Railroad Company, was fatally injured while on duty about 7:00 P. M. on the evening of March 20, 1940, when he was struck by a railroad car in the Clopton Yard of the railroad company south of Richmond, Virginia (R. 64-5). Action was instituted by decedent's executor under the Federal Employer's Liability Act in the District Court of the United States for the Eastern District of Virginia; at the conclusion of plaintiff's evidence, the District Court directed the jury to return a verdict for the defendant (R. 63). On appeal, the Circuit Court of Appeals for the Fourth Circuit affirmed (R. 77). The facts are as follows:

The defendant carrier operates each evening a train from Richmond to the south, in two sections (R. 39). Cars from north of Richmond are assembled at Acca Station and brought to Clopton Yard by a road engine (R. 17). Richmond cars are assembled at Byrd Street Station of the carrier and are brought to Clopton Yard by a yard engine (R. 40). These cars arrive at Clopton Yard about the same time (R. 40).

The aerial photograph (Plaintiff's Ex. No. 2) shows the physical features of Clopton Yard. Running through Clopton Yard from east to west is Clopton Road, a public highway (R. 26, 53, 56). Coming from the north of Clopton Road are three parallel tracks running north and south and crossing Clopton Road at right angles, of which the easternmost is the northbound main line, the center the southbound main line, and the westernmost is known as the slow siding (R. 26, 27). Coming in from the northwest are the tracks from Acca Station which also cross Clopton Road to the west of

slow siding and connect with slow siding south of the road (R. 19).

The decedent, Tiller, had been in the employ of the railroad for sixteen years and was familiar with the layout of tracks and aperation of trains in Clopton Yard (R. 14, 60, 61). He followed no regular routine in performing his assigned duties of policing the trains (R. 60), but he usually stood somewhere near Clopton Road crossing to check the seals on cars as they passed southwardly on the southbound main line (R. 26). The rules of the railroad require workers in yards to look out for their own safety and no warnings of switching or other movements of the trains are given them (R. 60).

On the night in question the cars from Acca came into Clopton Yard from the northwest, and the engineer was instructed to cut off three cars, go southwardly across Clopton Road until he reached slow siding, then to back up slow siding northwardly. These movements were made (R. 18, 19, 20). In the meantime, the cars from Byrd Street Station had come south on the southbound main line and were moving southwardly while the back-up movement on slow siding was in progress (R. 20). No one saw Tiller at the point of the accident before he was struck, but as found by the Circuit Court of Appeals (R. 71) it is evident that he was standing just north of Clopton Road on slow siding, or between slow siding and the southbound main line, facing eastwardly and with his flashlight inspecting the seals on the cars moving southwardly on the southbound main line. (Plaintiff's Ex. No. 3, R. 64). As he was thus engaged, he was struck by the head car of the northbound back-up movement on slow siding (R. 64).

The night was dark and there were no street lights or lights of any kind at or near Clopton Road crossing or in that part of Clopton Yard (R. 24).

The brakeman on the head car of the back-up movement was riding on its west side near the end holding a lantern with which he gave signals to the engineer as they approached Clopton Road, but it was his duty to look out for traffic from the west on Clopton Road and he did not see Tiller who was standing to the east of the back-up movement and facing eastwardly (R. 21, 29, 30, 64). The brakeman got off at or near Clopton Road and went back southwardly while his train continued on northwardly (R. 21). There were no lights on the head of the back-up movement (R. 50). The automatic bell on the backing engine three car lengths away was ringing (R. 25), but it is probable Tiller did not hear cars approaching on slow siding from the south because of the noise of the southbound main line movement (R. 72).

The engineer knew that it was Tiller's duty to check the cars and that in doing so he usually stood at or near the point where he was on this occasion (R. 26). The engineer, fireman, and brakeman all testified that they had never before made or seen a back-up movement northwardly on slow siding (R. 24, 49, 58). The movement on this occasion was necessitated by an error in the classification of cars at Byrd Street Station (R. 19, 36). Another employee infers that the movement was an unusual one (R. 41).

D.

Reasons Relied On for Allowance of Writ.

1. The United States Circuit Court of Appeals for the Fourth Circuit has decided an important question of Federal Law which has not been, but should be settled by this Court, namely, the interpretation of the amendment to the Federal Employers' Liability Act eliminating assumption of risk as a defense thereunder, in a railroad yard case.

2. The rule laid down in railroad yard cases, relied upon by the court below, casting upon the yard employee the full burden of looking out for himself and relieving the carrier of responsibility to that employee, was adopted by this Court fifty years ago. This rule should now be reexamined in the light of changed social and economic conditions, the trend of modern legislation and particularly in view of the amendment to the Federal Employers' Liability Act.

A supporting brief accompanies this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the order of final judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered by that court in this case on May 19, 1942, and that the said order of final judgment may be reversed by this Honorable Court, and the case remanded to the United States District Court for the Eastern District of Virginia for a new trial, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

J. VAUGHAN GARY,
RICHMOND MOORE, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals, Fourth Circuit (R. 69), is reported in 128 F. (2d) 420. The District Court of the United States for the Eastern District of Virginia did not deliver a written opinion.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended; U. S. C. Title 28, Sec. 347(a). The judgment of the United States Circuit

Court of Appeal, Fourth Circuit, to be reviewed, was entered on May 19, 1942 (R. 77).

III.

Statement of the Case.

A statement of the case appears under heading "C" of the Petition for Writ of Certiorari. In the interest of brevity, that statement is not now repeated, but is referred to, with the request that it be considered as here incorporated by reference.

IV.

Questions Presented.

The questions specifically brought forward by the Petition for Writ of Certiorari appear under heading "B" of the petition. Again, in the interest of brevity, they are not now repeated, but are referred to, with the request that they be considered as here incorporated by reference.

V.

The Statute Involved.

This suit was instituted under the provisions of the Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65; U. S. C. title 45, Chapter 2, Sections 51, et seq., as amended by Act of Congress August 11, 1939, Chapter 685, Section 1, 53 Stat. 1404, hereinafter called the Act, and there is no issue as to its applicability.

Sections 1 and 4 of the Act which are pertinent to the issues involved in this case were amended August 11, 1939, to read as follows:

Section 1:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and and foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Section 4:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents,

or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

VI.

ARGUMENT.

Summary of Argument.

1. The doctrine of assumption of risk has been abolished in cases arising under the Act by the amendment of August 11, 1939, in any case where injury or death to the employee resulted in whole or in part from the negligence of the carrier or any of its officers, agents or employees. Tiller, therefore, did not assume the risks of negligence of respondent or its employees.

2. The sole question is whether the respondent was negligent. Petitioner's evidence of respondent's negligence was more than sufficient to justify submission of the question to the jury.

3. The unusual movement of the trains in this case renders the respondent liable independently of the amendment to the Act.

1. Tiller did not assume the risks of negligence of respondent or its employees.

Prior to the amendment of August 11, 1939, of Section 4 of the Act, it was well established that in an action brought thereunder the common law defense of assumption of risk was open to the defendant except where it was shown that the company violated a Federal statute passed for the protection of the employee. *Toledo, St. L. & W. R. Co.* v. *Allen* (1928), 276 U. S. 165; 48 S. Ct. 215; 72 L. Ed. 513.

Under the common law rule a servant assumed the risk of the employer's negligence when the fact of such negligence was known to him, or was so plainly observable that he was presumed to have known of it, and the danger therefrom was appreciated by him. The employer could conduct his business according to his own ideas, although another method would be less dangerous, and if his employee knew the hazards incident to the business in the manner in which it was carried on, and continued in the employment, he "assumed the risk" of the more dangerous method. *Delaware, Lackawanna & Western R. R. Co.* v. *Koske*, (1929), 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 578; 18 R. C. L. 677.

State legislatures have long recognized the unfairness of the common law doctrine of assumption of risk and have abolished it by statute. The Congress of the United States, realizing that the application of the doctrine to cases arising under the Act, in the light of modern conditions, caused grave injustices to railroad employees, amended the Act in August, 1939, in an effort to eliminate such injustices.

In report No. 661 of the Senate Committee on the Judiciary of the 76th Congress, 1st Session, of June 22, 1939, Senator Neely explained the purpose of the amendment to Section 4 of the Act as follows:

> "The adoption of the amendment proposed to this section will eliminate some grave injustices to which railroad employees have been subject. Under section 4 of this chapter, as it now reads, no compensation can be obtained for an injury to an employee or for an employee's death caused by unsafe or dangerous conditions, which resulted from the negligence of the employer, his agents, or servants if the court finds, in the circumstances, that the employee knew, or should have known, of the danger involved.
>
> "The assumption-of-risk doctrine, as originally applied, undoubtedly meant that when a man entered the employ of a master he assumed all the risks that were

incident to his employment. If he worked in a shop where machinery was in motion, he was presumed to know that if he were not careful, he would probably be injured or killed. If he worked by the side of a fellow employee, he had ample opportunity to know whether his companion was careful or negligent in the discharge of his duties; and knew what, if any, precautions against his fellow servant's carelessness should be taken. If an appliance were broken or defective, and an employee continued to work with it, he assumed the risk of his action. But such simple doctrines do not apply equitably under the infinite complexities of modern industrial practices when one's fellow servants may be numbered by hundreds or even thousands, and unlimited output and maximum speed are watchwords on every hand. The common-law doctrine of assumption of risk, as applied to the worker in a small factory, cannot be fairly applied to the railroad man, whose services are performed over 150 miles of railroad track, or in a large and congested railroad yard.

"The present rule apparently ignores the fact that the master, and not the servant, has control over the conditions which affect the safety of employees. In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances. The existing rule not only permits the employer to be careless about the conditions of his premises but, in effect, places a premium upon his carelessness. He may be negligent in allowing his road, or his yard, to become littered with debris; the men become acquainted with the fact that the yard, or the road is in a dangerous condition, and having knowledge of that fact and continuing to work in spite of that knowledge, if injured, they are held to have assumed the risk, notwithstanding the fact that they have no control over the matter and that the condition was created solely by the negligence of the employer.

"An exceptionally harsh feature of the rule lies in the fact that if an employee knows of an unsafe condition,

and complains about it, he is held to have the choice of continuing to work and assuming the risk, or quitting his employment and seeking a livelihood elsewhere.

In the case of *Hallstein* v. *P. R. R.* (30 Fed. (2d) 594 (1929)), in holding that the plaintiff could not recover for an injury due to the failure of an employer to furnish a safety belt upon request, the court said:

"'Knowing the situation, he preferred to take the risk of injury rather than to quit his employment, and this choice was voluntary, albeit, collaterally influenced by economic need.'

"Under present economic conditions, employees must, of necessity, continue to work under unsafe conditions or frequently sacrifice the fruits of many years of accumulated seniority, go on relief, or beg their bread.

"The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.

"Under existing law, if the violation of any safety statute contributes to an injury to an employee, the employer is deprived of a defense although the injury may not have been caused by the employer's negligence. The proposed amendment preserves this feature of the law. It seems reasonable to provide that in all other cases in which the injury results from the negligence of an employer or fellow servant the doctrine of comparative negligence rather than the outmoded doctrine of assumption of risk should apply."

Counsel for the petitioner contend that the 1939 amendment to Section 4 of the Act was designed to change the then existing law as established by *Aerkfetz* v. *Humphreys* (1892) 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758; *Ches. & Ohio Ry.* v. *Nixon*, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914;

Toledo St. L. & W. R. R. v. *Allen*, 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Delaware L. & W. R. Co.* v. *Koske*, 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 578; and numerous other Federal Court decisions.

In *Wichita Falls & S. R. Co.* v. *Lindley* (Texas 1940), 143 S. W. (2d) 428 at 431, the Court, in referring to the amendment, said:

> "The deliberate use of the language used in the amendment which relieves an employee of assumed risk when injured as a result of the carrier's negligence, when no such expression was found in the act so amended, should be construed as an expression by the Legislative Body that a change of law was intended. *Brewster* v. *Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457".

Counsel for petitioner did not argue in the court below nor did they intend that their argument should imply, as inferred by the Court, that in every case where the doctrine was formerly applicable there was negligence on the part of the employer. Counsel did argue that those cases, generally referred to as the railroad yard cases, were not authority for the contention of opposing counsel that no duty or obligation rests upon a railroad to properly illuminate its yards, to maintain lights on shifting cars, to keep a lookout for its employees within the yards or to warn them of approaching danger, and that the failure of the railroad to perform such duties does not constitute negligence.

The entire line of decisions rests primarily upon the doctrine of the assumption of risk, and under that doctrine the employee could not recover regardless of the negligence of the employer. The question of the negligence of the employer was, therefore, not an issue in those cases. It is a fair assumption that the courts, in those cases, considered that the failure of the railroad to take precautions for the safety of its employees commensurate with the dangers that they are likely to encounter did constitute negligence

on the part of the railroad. Otherwise, there would have been no need to invoke the doctrine of assumption of risk, for negligence of the carrier is an essential element of recovery under the Act.

Counsel for the petitioner, therefore, respectfully submit that the numerous decisions referred to by the court below did not hold that the carrier was free from negligence as stated by that court, but did hold that regardless of negligence the carrier was protected by the doctrine of assumption of risk. The doctrine of assumption of risk has now been abolished in any case where injury or death results in whole or in part from the negligence of the carrier. The sole issue in the instant case, therefore, is whether sufficient evidence of negligence on the part of the respondent railroad or its officers, agents or employees, was introduced at the trial of this cause to justify the submission of the question of such negligence to the jury.

2. Petitioner's evidence of respondent's negligence was more than sufficient to justify submission of question to the jury.

The respondent owed a duty to Tiller in this case to exercise reasonable care to provide him a reasonably safe place of work, which included care in establishing a reasonably safe system or method of work, and he had a right to assume that this would be done. *Chesapeake & O. R. Co.* v. *Proffitt* (1916), 241 U. S. 462, 36 S. Ct. 620, 60 L. Ed. 1102.

The place of work in the instant case was a railroad yard, which under the most favorable conditions is a perilous place of employment. Counsel for the petitioner do not consider superficial, as termed by the court below, the argument that as the doctrine of the assumption of the risk has been abolished, the carrier can no longer interpose it as a shield against the consequences of its neglect and hence is liable for injuries to its employees in its railroad yards or

elsewhere, unless it takes precautions for their safety commensurate with the danger that they are likely to encounter. The carrier is required to exercise reasonable care with respect to the safety of its employees, and a reasonably prudent man, acting reasonably, exercises greater care under conditions fraught with unusual danger than in ordinary circumstances.

The respondent in the instant case wholly failed to perform its duty when it assigned Tiller the task of inspecting the seals on its cars, at night, in an unlighted railroad yard with the tracks so close together that it was necessary for him to stand on or near an adjoining track, and, while he was thus engaged, caused one of its engines to push, in a back-up movement, three high gondola cars, without lights, without a lookout and without adequate warning over the track on or near which he was standing, thereby causing his death. An ordinarily perilous place of employment, because of the negligence of the respondent and its employees, became a death trap. A case strikingly in point, in which the court held under similar circumstances that the defendant was guilty of negligence, is *R. & D. R. Co.* v. *Norment* (1887), 84 Va. 167, 4 S. E. 211. See also *Seaboard A. L. R. Co.* v. *Koennecke* (1915), 239 U. S. 352, 36 S. Ct. 126, 60 L. Ed. 324; *Clinchfield Coal Corp.* v. *Ray* (1917), 121 Va. 318, 93 S. E. 601.

Certainly the facts in this case disclose a situation from which a jury might determine negligence on the part of the respondent and justify the submission of the question of negligence to the jury. To hold otherwise, this Court must determine that under the facts as presented the respondent was not guilty of negligence as a matter of law.

In the recent case of *Jacob* v. *City of New York*, 62 S. C. Rep. 854, decided by this Court March 30, 1942, Mr. Justice Murphy, delivering the opinion of the Court, said:

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

To deny petitioner the right to have the jury pass on the question of negligence in this case is to say that under the Federal Employers' Liability Act there is no duty on the carrier to take any precautions for the safety of its employees in a railroad yard and that its failure to do so is not negligence as a matter of law. Such a ruling would completely nullify the amendment of August 11, 1939, to the Act in so far as railroad yard cases are concerned.

3. The unusual movement of the trains in this case renders respondent liable independently of the amendment to the act.

In the so-called railroad yard cases, to which reference has heretofore been made, the rule is well recognized that if an employee in a railroad yard is exposed to some unusual danger by reason of an unusual movement of the trains or a departure from the practice generally followed, the employer is in duty bound to give him warning. *Toledo, St. L. & W. R. Co.* v. *Allen* (1928), 276 U. S. 165; 48 S. Ct. 215; 72 L. Ed. 513.

This rule was followed in the case of *Chesapeake & O. Ry. Co.* v. *Peyton* (1918), 4 Cir., 253 F. 734, a case similar to the instant case, to which the attention of the Court is particularly directed. In that case it was charged that the railroad changed the operation of its cars on a coal pier from one track to another without giving its employees

notice of the change or warning of the approach of the cars, and the Court held:

> "The instructions to the jury on the points really in issue were in strict conformity to the law as we have stated it, and were not inconsistent with each other. In brief, they were as follows: the defendant was under no duty to warn its employees on the pier by bell or whistle of dangers known to them, or to keep a lookout to protect them against such dangers; but the jury might find negligence from failure to give warning or keep a lookout to protect employees from perils brought upon them by unusual and unexpected action of defendant."

The petitioner in the instant case introduced ample evidence to show that the backup movement on slow siding which caused the death of Tiller was an unusual movement, and for that reason he was not looking for the approach of the cars. Wamack, the switchman on the yard, testified that the movement was necessary because certain cars had to be reclassified. In other words, certain cars had been erroneously placed in making up the train at Byrd Street Station and this error had to be corrected by changing the position of the cars when the train reached Clopton Yard (R. 37, 38, 52). Certainly, it cannot be true that such errors are customary or usual, for the railroad would not keep a classification employee in its employ if he customarily or usually made such mistakes. The cars were not backed into slow siding unless a reclassification of the cars was required, and the testimony indicates that such a movement was not necessary even when a reclassification was required (R. 52).

Myrick, the engineer on the engine which caused the injury, testified that he had been on this particular assignment about fifty times (R. 28), and that never before in all his experience had he made the backup movement on slow siding. Wright, the fireman on Myrick's engine, had

made this particular run fifteen or twenty times and had never made the backup movement on slow siding. In answer to an inquiry on this question, he stated (R. 58):

> "No, sir, I had always got in the clear on the south side."

Dickens, the brakeman on the train, had been on that assignment from twelve to twenty times and "had never been in slow siding before" (R. 49, 51). Although Wamack, the switchman, testified that the movement was not unusual, in his cross-examination he stated:

> "When I dropped off here to make the usual cut of Second 209, I had to hold on to two more cars, being informed by Yardmaster W. J. Jones that we had a classification to make. So instead of making the cut where I was going to make it, I had to drop back two more car lengths." (R. 41.)

It is of particular significance that although Tiller had been on this run for sixteen years, when he regained consciousness after being extricated from the wheels of the car, his first remarks were to ask what hit him and how he got hurt, thus clearly indicating that the movement was unusual and unexpected by him. On this issue the case of plaintiff is strengthened by the presumption that Tiller in standing on or near the slow siding would look and listen for a train in the direction from which he had reason to expect it. *Chesapeake & O. Ry. Co.* v. *Peyton, supra,* at 735.

Counsel for the petitioner contend that this evidence was sufficient to justify a reference to the jury on the issue as to whether the movement in question was such as to place the case under the well recognized exception to the assumption-of-risk doctrine which requires adequate warnings to be given by railroads to their employees and proper lookout to be kept for them in cases of unusual movements in their yards.

Conclusion.

In conclusion, counsel for the petitioner respectfully submit:

1. That under the Act, as amended on August 11, 1939, the common law doctrine of assumption of risk has no application to this case.

2. That petitioner's evidence of negligence on the part of the respondent was more than sufficient to justify reference of the case to the jury.

3. That independently of the question of the applicability of the doctrine of assumption of risk, the evidence presented by the petitioner was sufficient to justify the submission of the case to the jury on the issue as to whether the movement of the train which caused Tiller's death was so unusual as to require proper lookout for and adequate warning to him.

4. That the Judge of the District Court erred in refusing to submit the case to the jury on the issues of fact and in directing a verdict for the defendant, and that the United States Circuit Court of Appeals, Fourth Circuit, erred in affirming that action and refusing to remand the case for a new trial.

5. That a writ of certiorari, therefore, should be granted, and that this Court should review and reverse the decision of the Circuit Court of Appeals and remand the case for a new trial.

Respectfully submitted,

J. VAUGHAN GARY,
RICHMOND MOORE, JR.,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF FOR PETITIONER.

J. VAUGHAN GARY,
RICHMOND MOORE, JR.,
Counsel for Petitioner.

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vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION,

Respondent.

BRIEF FOR PETITIONER.

I.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals, Fourth Circuit (R. 69), is reported in 128 F. (2d) 420. The District Court of the United States for the Eastern District of Virginia did not deliver a written opinion. The directed verdict of the Court appears in the Record on page 63 and its judgment on page 66.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended; U. S. C. Title 28, Sec. 347(a). The judgment of the United States Circuit Court of Appeals, Fourth Circuit, to be reviewed, was entered on May 19, 1942 (R. 77).

III.

Statement of the Case.

The decedent, John L. Tiller, a sergeant of police in the employ of Atlantic Coast Line Railroad Company, was fatally injured while on duty about 7:00 P. M. on the evening of March 20, 1940, when he was struck by a railroad car in the Clopton Yard of the railroad company south of Richmond, Virginia (R. 64, 65). Action for damages was instituted by decedent's executor under the Federal Employers' Liability Act in the District Court of the United States for the Eastern District of Virginia; at the conclusion of plaintiff's evidence, the District Court directed the jury to return a verdict for the defendant (R. 63). On appeal, the Circuit Court of Appeals for the Fourth Circuit affirmed the judgment of the said District Court (R. 77). The facts are as follows:

The respondent carrier operates each evening a freight train from Richmond to the south, in two sections (R. 39). Cars from north of Richmond are assembled at the Acca Yard of the Richmond, Fredericksburg and Potomac Railroad and brought to Clopton Yard by

a road engine (R. 17). Richmond cars are assembled at Byrd Street Station of the carrier and are brought thence to Clopton Yard (R. 39). These cars arrive at Clopton Yard about the same time and are there assembled for further transportation in such order that they may be conveniently dropped off at divers southern points (R. 40).

The aerial photograph (Plaintiff's Ex. No. 2) shows the physical features of Clopton Yard. Running through Clopton Yard from east to west is Clopton Road, a public highway (R. 26, 53, 56). Coming from the north of Clopton Road are three parallel tracks running north and south and crossing Clopton Road at right angles, of which the easternmost is the northbound main line, the center the southbound main line, and the westernmost is known as slow siding (R. 26, 27). Coming in from the northwest are the tracks from Acca which also cross Clopton Road to the west of slow siding and connect with slow siding south of the road (R. 19).

The decedent, Tiller, had been in the employ of the railroad for sixteen years and was familiar with the layout of tracks and operation of trains in Clopton Yard (R. 14, 60, 61). He followed no regular routine in performing his assigned duties of policing the trains (R. 60), but he usually stood somewhere near Clopton Road crossing to check the seals on cars as they passed southwardly on the southbound main line (R. 26, 35, 36). The rules of the railroad require workers in yards to look out for their own safety and no warnings of switching or other movements of the trains are given them (R. 60).

On the night in question the cars from Acca came into Clopton Yard from the northwest, and the engineer was instructed to cut off three cars, go southwardly across Clopton Road until he reached slow siding, then

to back up slow siding northwardly. These movements were made (R. 18, 19, 20). In the meantime, the cars from Byrd Street Station had come south on the southbound main line and were moving southwardly while the back-up movement on slow siding was in progress (R. 20). The distance between the western rail of the southbound main line track and the eastern rail of slow siding was 7 feet, 11½ inches, which was reduced to 3 feet, 7½ inches by the overhang of the cars moving in opposite directions (R. 45).

No one saw Tiller at the point of the accident before he was struck, but as found by the Circuit Court of Appeals (R. 71) it is evident that he was standing just north of Clopton Road on slow siding, or between slow siding and the southbound main line, facing eastwardly and with his flashlight inspecting the seals on the cars moving southwardly on the southbound main line (Plaintiff's Ex. No. 3, R. 64). As he was thus engaged, he was struck by the head car of the northbound back-up movement on slow siding (R. 64). His lighted flashlight was found a few feet north of Clopton Road, his cap and his pistol at intervals a few feet further north, and finally he was found under the wheels on the east side of the rear end of the head car (R. 22, 57).

The night was dark and there were no street lights, flood lights or artificial lights of any kind at or near Clopton Road crossing or in that part of Clopton Yard (R. 24).

The brakeman on the head car of the back-up movement was riding on its west side near the end holding a lantern with which he gave signals to the engineer as they approached Clopton Road, but it was his duty to look out for traffic from the west on Clopton Road and he did not see Tiller who was standing to the east of the back-up movement and facing eastwardly (R. 21, 29, 30,

53, 54, 64). The brakeman got off at or near Clopton Road and went back southwardly while his train continued on northwardly (R. 21). There were no lights on the head of the back-up movement, and the only light on the rear of the backing locomotive was a small electric bulb on the tender (R. 50). The automatic bell on the locomotive three car lengths away was ringing (R. 25), but it is probable Tiller did not hear cars approaching on slow siding from the south because of the noise of the southbound main line movement (R. 72).

The engineer knew that it was Tiller's duty to check the cars and that in doing so he usually stood at or near the point where he was on this occasion (R. 26). The engineer, fireman and brakeman all testified that they had never before made or seen a back-up movement northwardly on slow siding (R. 24, 49, 58). The movement on this occasion was necessitated by an error in the classification of cars at Byrd Street Station (R. 19, 36). Another employee infers that the movement was an unusual one (R. 41).

IV.

Questions Presented.

1. Whether in an action under the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of August 11, 1939, by the executor of a deceased railroad employee against the railroad for damages for his death resulting from fatal injuries sustained by him while working in the railroad's yard, there was sufficient evidence of negligence on the part of the carrier for the case to be submitted to the jury.

2. Whether by reason of the amendment to the Federal Employers' Liability Act to the effect that in an

action under that Act the employee shall not be held to have assumed the risk of his employer's negligence, the carrier may no longer rely upon the former rule that its employees in railroad yards assume the risk of all usual yard movements and must look out for their own safety, and, therefore, must take precautions for the safety of its employees in its railroad yards commensurate with the dangers involved.

3. Whether there was sufficient evidence of an unusual movement by the train which struck decedent for the case to be submitted to the jury on that issue, the case of an unusual movement, prior to the amendment above referred to, constituting an exception to the former rule.

V.

The Statute Involved.

This suit was instituted under the provisions of the Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65; U. S. C. Title 45, Chapter 2, Sections 51, et seq., as amended by Act of Congress August 11, 1939, Chapter 685, Section 1, 53 Stat. 1404, hereinafter called the Act, and there is no issue as to its applicability.

Sections 1 and 4 of the Act which are pertinent to the issues involved in this case were amended August 11, 1939, to read as follows:

Section 1:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the

District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Section 4:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

VI.

ARGUMENT.

Summary of Argument.

1. The doctrine of assumption of risk has been abolished in cases arising under the Act by the amendment of August 11, 1939, in any case where injury or death to the employee resulted in whole or in part from the negligence of the carrier or any of its officers, agents or employees. Employee Tiller, therefore, did not assume the risk of negligence of respondent or its employees.

2. The sole question is whether the respondent was negligent. Petitioner's evidence of respondent's negligence was more than sufficient to justify submission of the question to the jury.

3. Respondent was negligent as a matter of law because of its failure to equip its locomotive with proper lights as prescribed by the Federal Boiler Inspection Act and the Rules of the Interstate Commerce Commission adopted pursuant thereto.

4. The unusual movement of the trains in this case renders the respondent liable independently of the amendment to the Act.

1. Tiller did not assume the risk of negligence of respondent or its employees.

Prior to the August 11, 1939, amendment to the Act, it was well established that in an action brought thereunder the common law defense of assumption of risk was open to the defendant except where it was shown that the company had violated a Federal statute passed

for the protection of the employee. *Toledo, St. L. & W. R. Co.* v. *Allen,* (1928) 276 U. S. 165; 48 S. Ct. 215; 72 L. Ed. 513.

Under the common law rule a servant assumed the risk of the employer's negligence when the fact of such negligence was known to him, or was so plainly observable that he was presumed to have known of it, and the danger therefrom was appreciated by him. The employer could conduct his business according to his own ideas, although another method would be less dangerous, and if his employee knew the hazards incident to the business in the manner in which it was carried on, and continued in the employment, he "assumed the risk" of the more dangerous method. *Delaware, Lackawanna & Western R. R. Co.* v. *Koske,* (1929) 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 578; 18 R. C. L. 677.

State legislatures have long recognized the unfairness of the common law doctrine of assumption of risk and have abolished it by statute. The Congress of the United States, realizing that the application of the doctrine to cases arising under the Act, in the light of modern conditions, cause grave injustices to railroad employees, amended the Act in August, 1939, in an effort to eliminate such injustices.

In report No. 661 of the Senate Committee on the Judiciary of the 76th Congress, 1st Session, of June 22, 1939, Senator Neely explained the purpose of the amendment to Section 4 of the Act as follows:

> "The adoption of the amendment proposed to this section will eliminate some grave injustices to which railroad employees have been subject. Under section 4 of this chapter, as it now reads, no compensation can be obtained for an injury to an employee or for an employee's death caused by unsafe or dangerous conditions, which resulted from the

negligence of the employer, his agents, or servants if the court finds, in the circumstances, that the employee knew, or should have known, of the danger involved.

"The assumption-of-risk doctrine, as originally applied, undoubtedly meant that when a man entered the employ of a master he assumed all the risks that were incident to his employment. If he worked in a shop where machinery was in motion, he was presumed to know that if he were not careful, he would probably be injured or killed. If he worked by the side of a fellow employee, he had ample opportunity to know whether his companion was careful or negligent in the discharge of his duties; and knew what, if any, precautions against his fellow servant's carelessness should be taken. If an appliance were broken or defective, and an employee continued to work with it, he assumed the risk of his action. But such simple doctrines do not apply equitably under the infinite complexities of modern industrial practices when one's fellow servants may be numbered by hundreds or even thousands, and unlimited output and maximum speed are watchwords on every hand. The common-law doctrine of assumption of risk, as applied to the worker in a small factory, cannot be fairly applied to the railroad man, whose services are performed over 150 miles of railroad track, or in a large and congested railroad yard.

"The present rule apparently ignores the fact that the master, and not the servant, has control over the conditions which affect the safety of employees. In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances. The existing rule not only permits the employer to be careless about the conditions of his premises but, in effect, places a premium upon his carelessness. He may be negligent in allowing his road, or his yard,

to become littered with debris; the men become acquainted with the fact that the yard, or the road is in a dangerous condition, and having knowledge of that fact and continuing to work in spite of that knowledge, if injured, they are held to have assumed the risk, notwithstanding the fact that they have no control over the matter and that the condition was created solely by the negligence of the employer.

"An exceptionally harsh feature of the rule lies in the fact that if an employee knows of an unsafe condition, and complains about it, he is held to have the choice of continuing to work and assuming the risk, or quitting his employment and seeking a livelihood elsewhere.

"In the case of *Hallstein* v. *P. R. R.* (30 Fed. (2d) 594 (1929)), in holding that the plaintiff could not recover for an injury due to the failure of an employer to furnish a safety belt upon request, the court said:

" 'Knowing the situation, he preferred to take the risk of injury rather than to quit his employment, and this choice was voluntary, albeit, collaterally influenced by economic need.'

"Under present economic conditions, employees must, of necessity, continue to work under unsafe conditions or frequently sacrifice the fruits of many years of accumulated seniority, go on relief, or beg their bread.

"The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.

"Under existing law, if the violation of any safety statute contributes to an injury to an employee, the employer is deprived of a defense although the injury may not have been caused by the

employer's negligence. The proposed amendment preserves this feature of the law. It seems reasonable to provide that in all other cases in which the injury results from the negligence of an employer or fellow servant the doctrine of comparative negligence rather than the outmoded doctrine of assumption of risk should apply."

Counsel for the petitioner contend that the 1939 amendment to Section 4 of the Act was designed to change the then existing law as established by *Aerkfetz* v. *Humphreys,* (1892) 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758; *Ches. & Ohio Ry.* v. *Nixon,* (1926) 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914; *Toledo, St. L. & W. R. R.* v. *Allen,* (1928) 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Delaware L. & W. R. Co.* v. *Koske,* (1929) 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 578; and the other Federal Court decisions generally referred to as the railroad yard cases, which were cited and relied upon by the court below.

The rule laid down in those cases and followed by the court below, placing upon yard employees the full burden of looking out for themselves and relieving the carrier of responsibility for the safety of such employees, was adopted by this Court fifty years ago. The rule is completely outmoded today in the light of changed social and economic conditions, and Congress, recognizing the trend of modern legislation, has directed a change by the 1939 amendment to the Act.

In *Wichita Falls & S. R. Co.* v. *Lindley,* (Texas 1940) 143 S. W. (2d) 428 at 431, the Court, in referring to the amendment, said:

"The deliberate use of the language used in the amendment which relieves an employee of assumed risk when injured as a result of the carrier's negligence, when no such expression was found in the

act so amended, should be construed as an expression by the Legislative Body that a change of law was intended. *Brewster* v. *Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457."

Counsel for petitioner did not argue in the Court below nor did they intend their argument to imply, as inferred by the Court, that in every case where the doctrine of assumption of risk was formerly applicable there was negligence on the part of the employer. Counsel did argue, and still contend, that the so-called railroad yard cases referred to above are not authority for the contention that no duty or obligation rests upon a railroad to properly illuminate its yards, to maintain lights on shifting cars, to keep a lookout for its employees within the yards, or to warn them of approaching danger and that the failure of the railroad to perform such duties does not constitute negligence.

It is respectfully submitted that the question of the negligence of the employer was not an issue in those cases. The Court below said:

> "Specifically it was held (in the railroad yard cases) that in the movement of cars in a railroad yard by day or by night, a carrier was under no duty or obligation to look out for the employees within the yard or warn them of the approach of cars in the ordinary manner by the blowing of whistles, the ringing of bells or the display of lights or otherwise." (R. 72).

A careful analysis of the entire line of decisions there referred to shows that they rest primarily upon the doctrine of assumption of risk and under that doctrine the employer was not liable regardless of his negligence, for the employee assumed the risk even of such negligence. Specifically it was held that notwithstanding the failure

of the carrier to look out for the employees within the yard and warn them of the approach of cars, the employee could not recover because he had assumed the risk of danger created by the failure of the carrier to furnish him with adequate protection.

It is a fair assumption that the Courts, in those cases, considered that the failure of the railroad to take precautions for the safety of its employees commensurate with the danger that they were likely to encounter, did constitute negligence on the part of the railroad. Otherwise, there would have been no need to invoke the doctrine of assumption of risk, for negligence of the carrier is an essential element of recovery under the Act.

Counsel for the petitioner do not contend that the 1939 amendment to the Act attempts "to raise the standard of care required of a carrier with respect to the safety of its employees in the performance of their duties in railroad yards and other places of danger" (R. 76). The standard is unchanged; it is reasonable care, as it has always been. The difference is, that now, under the amendment, the carrier must use reasonable care to provide for the safety of its employees and when it fails to use reasonable care it can no longer interpose the doctrine of assumption of risk as a shield against the consequences of its neglect.

It is admitted that the 1939 amendment to the Act abolished the doctrine of assumption of risk only in those cases where injury or death resulted in whole or in part from the negligence of the carrier or its officers, agents or employees. The doctrine, however, has been abolished in those cases and if the death in the instant case resulted in whole or in part from the negligence of the respondent, then the respondent is liable in damages to the petitioner for such death. The sole issue, there-

fore, is whether sufficient evidence of negligence on the part of the respondent or its officers, agents or employees, was introduced at the trial of the cause to justify the submission of the case to the jury on the question as to whether the death of employee Tiller resulted in whole or in part from the negligence of the respondent..

2. Petitioner's evidence of respondent's negligence was more than sufficient to justify submission of question to jury.

The respondent owed a duty to Tiller in this case to exercise reasonable care to provide him a reasonably safe place of work, which included care in establishing a reasonably safe system or method of work, and he had a right to assume that this would be done. *Chesapeake & O. R. Co.* v. *Proffit,* (1916) 241 U. S. 462, 36 S. Ct. 620, 60 L. Ed. 1102.

The place of work in the instant case was a railroad yard, which under the most favorable conditions is a perilous place of employment. Counsel for the petitioner do not consider superficial, as termed by the court below, the argument that as the doctrine of assumption of risk has been abolished, the carrier can no longer interpose it as a shield against the consequences of its neglect and hence is liable for injuries to its employees in its railroad yards or elsewhere, unless it takes precautions for their safety commensurate with the danger that they are likely to encounter. The carrier is required to exercise reasonable care with respect to the safety of its employees, and a reasonably prudent person, acting reasonably, exercises greater care under conditions

fraught with unusual danger than in ordinary circumstances.

The respondent wholly failed to perform its duty when it assigned Tiller the task of inspecting the seals on its cars, at night, in an unlighted railroad yard with the tracks so close together that it was necessary for him to stand on or near an adjoining track, and, while he was thus engaged, caused one of its engines to push, in a back-up movement, three high gondola cars, without lights, without a lookout and without adequate warning over the track on or near which he was standing, thereby causing his death. An ordinarily perilous place of employment, because of the negligence of the respondent and its employees, became a veritable death trap. A case strikingly in point, in which the court held under similar circumstances that the defendant was guilty of negligence, is *R. & D. R. Co.* v. *Norment,* (1887) 84 Va. 167, 4 S. E. 211. See also *Seaboard A. L. R. Co.* v. *Koennecke,* (1915) 239 U. S. 352, 36 S. Ct. 126, 60 L. Ed. 324; *Clinchfield Coal Corp.* v. *Ray,* (1917) 121 Va. 318, 93 S. E. 601; *C. & O. Ry.* v. *Folkes,* (1942) 179 Va. 60, 18 S. E. (2d) 309.

Many railroad yards are equipped with flood lights; the rules of some railroads require a light on the head car of all back-up movements; the rules of some railroads require the placing of an employee on the head of each back-up movement for the entire length of the movement to serve as a lookout and to give warnings of its approach to employees and others in positions of danger. Had the respondent taken any one of these precautions for the safety of its employees, the death of employee Tiller would not have occurred.

The evidence shows that there were no artificial lights in the yard and that the yard was in total darkness

(R. 24); that the only lights on the front of the back-up movement were a small electric bulb on the tender of the engine, three hopper cars distance from the front end of the movement (R. 50, 51), and a signal lantern in the hands of the brakeman who stepped off the cars before they struck Tiller (R. 21, 53, 54); that the only employee on the head of the back-up movement was the brakeman, who was specifically charged with the duty of signaling the engineer and keeping a lookout for travelers on the public highway which crossed the tracks (R. 51, 53, 54); that he stepped off the car on the opposite side from Tiller before Tiller was struck and that the car passed between him and Tiller immediately after he stepped off (R. 21, 48).

From this evidence the jury might have determined that the failure of the respondent to equip the yard with adequate lighting facilities was negligence; that the failure of the respondent to provide an adequate light on the front end of the back-up movement was negligence; that the failure of the respondent to provide a lookout and adequate warnings for its employees was negligence; and that the death of employee Tiller resulted in whole or in part from such negligence. Certainly the undisputed facts in the case fully justify the submission of the question of negligence to the jury.

In the recent case of *Jacob* v. *New York City,* 315 U. S. 752, 62 S. Ct. 854, decided by this Court March 30, 1942, Mr. Justice Murphy, delivering the opinion of the Court, said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by

the Constitution or provided by statute, should be jealously guarded by the courts."

To deny petitioner the right to have the jury pass on the question of negligence in this case is to say that under the Federal Employers' Liability Act there is no duty on the carrier to take any precautions for the safety of its employees in a railroad yard and that its failure to do so is not negligence as a matter of law. Such a ruling would completely nullify the August 11, 1939, amendment to the Act insofar as railroad yard cases are concerned.

3. Respondent was negligent as a matter of law because of its violation of the Federal Boiler Inspection Act and the Rules of the Interstate Commerce Commission adopted pursuant thereto.

Counsel for the petitioner desire at this time to present to the Court a contention which has not been urged heretofore in these proceedings. They are not unmindful of the rules of the Court, but the contention here advanced is merely an additional argument on the question of negligence which was specifically brought forward by the petition for writ of certiorari. It does not present a new issue but furnishes a new and different approach to the main issue of negligence, upon which petitioner has relied from the institution of this suit.

The Federal Boiler Inspection Act, 45 U. S. C. A., Sec. 22, et seq., was enacted "to promote the safety of employees and travelers upon railroads." Section 2 of the said Act, 45 U. S. C. A. Sec. 23, reads as follows:

"Use of unsafe locomotives and appurtenances unlawful; inspection and tests. It shall be unlawful

for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (June 7, 1924, c. 355, § 2, 43 Stat. 659.)"

The said law authorizes the Interstate Commerce Commission to prescribe rules and regulations governing locomotives, their equipment, boilers and appurtenances thereto.

In the case of *U. S.* v. *B. & O. Ry. Co.*, (1935) 293 U. S. 454, 55 S. Ct. 268, Mr. Justice Brandeis, delivering the opinion of the Court, says on page 271:

"* * * * * Referring to the argument of the states 'that the authority delegated to the Commission does not extend to ordering the use or installation of equipment of any kind, *Baltimore & Ohio R. R. Co.*, v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419,' we said: 'The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.' In closing the

opinion, we added: 'If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample.' "

Pursuant to the provisions of the said law, the Interstate Commerce Commission has promulgated and published certain rules and instructions for the inspection and testing of steam locomotives and tenders and their appurtenances. Rules 129 and 131, prescribed by the Commission, which were in full force and effect at the time of employee Tiller's death, read as follows:

"129. (a) *Locomotives used in road service.*—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

(b) Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements.

(c) Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.

(d) When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight."

"131. *Locomotives used in yard service.*—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in rule 129, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."

The locomotive which caused the death of employee Tiller was a locomotive used in yard service between sunset and sunrise and was subject to the provisions of Rule 131 of the Commission, *C. & O. Ry. Co.* v. *Wood,* (1932) 6 Cir., 59 F. (2d) 1017. The locomotive, therefore, should have been equipped with lights as prescribed by the said rule, whereas it appears from the evidence that the only light on the rear of the locomotive was a small electric bulb on the top of the tender (R. 50).

Opposing counsel doubtless will argue that even though the locomotive had been equipped with lights in compliance with Rule 131, the rear light would have been obscured by the three cars which it was pushing. Surely it was not the intent of the law or the Commission that the effectiveness of this rule requiring lights for the safety of employees should be nullified by the action of the railroad in obscuring such lights. The Commission has recognized the danger of back-up movements in railroad yards at night and has prescribed as a safety measure that a rear light of certain intensity be maintained on locomotives used in yard service between sunset and sunrise. The railroad cannot refuse to provide such light nor can it adopt a

method of shifting its cars which would obscure such light when provided, and thereby nullify the rule of the Commission. The instant case demonstrates the wisdom of the rule, as its violation by the respondent has resulted in the unnecessary death of one of its employees.

The rule of the Commission has the force and effect of a statutory provision and imposes upon the respondent a mandatory, absolute, unqualified and continuing duty to comply with its requirements. *Southern Ry. Co.*, v. *Lunsford*, (1936) 297 U. S. 398, 56 S. Ct. 504; *Napier* v. *Atlantic Coast Line*, (1926) 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; *B. & O. Ry. Co.* v. *Groeger*, (1925) 266 U. S. 521, 45 S. Ct. 169; *Chesapeake & O. Ry. Co.* v. *Wood*, (1932) 59 F. (2d) 1017.

In *B. & O. R. Co.* v. *Groeger, supra*, the Court said, on page 528:

> "That Act (the Boiler Inspection Act) was passed to promote the safety of employees and is to be read and applied with the Federal Employers' Liability Act. Under the latter, defendant is liable for any negligence chargeable to it which caused or contributed to cause decedent's death (§ 1); and he will not be held guilty of contributory negligence (§ 3) or to have assumed the risk of his employment (§ 4) if a violation of § 2 of the Boiler Inspection Act contributed to cause his death."

The failure of the respondent to comply with the rule of the Commission and its consequent failure to comply with the provisions of the Boiler Inspection Act, is negligence as a matter of law. This act of negligence unquestionably contributed to employee Tiller's death, for it is fair to assume that if a light on the rear of the backing locomotive had cast its beam at least 300 feet

as required by the rule, the engineer or fireman would have seen Tiller and Tiller would have seen the approaching light. In either event Tiller would have received warning of the approaching cars and his death would have been avoided. The petitioner is entitled, therefore, to a recovery under the Federal Employers' Liability Act.

4. The unusual movement of the trains in this case renders respondent liable independently of the amendment to the Act.

In the railroad yard cases, to which reference has heretofore been made, the rule is well recognized that if an employee in a railroad yard is exposed to some unusual danger by reason of an unusual movement of the trains or a departure from the practice generally followed, the employer is in duty bound to give him warning. *Toledo, St. L. & W. R. Co.* v. *Allen,* (1928) 276 U. S. 165; 48 S. Ct. 215; 72 L. Ed. 513.

This rule was followed in the case of *Chesapeake & O. Ry. Co.* v. *Peyton,* (1918) 4 Cir., 253 F. 734, a case similar to the instant case, to which the attention of the Court is particularly directed. In that case it was charged that the railroad changed the operation of its cars on a coal pier from one track to another without giving its employees notice of the change or warning of the approach of the cars, and the Court held:

> "The instructions to the jury on the points really in issue were in strict conformity to the law as we have stated it, and were not inconsistent with each other. In brief, they were as follows: the defendant was under no duty to warn its employees on the pier by bell or whistle of dangers known to them, or to

keep a lookout to protect them against such dangers; but the jury might find negligence from failure to give warning or keep a lookout to protect employees from perils brought upon them by unusual and unexpected action of defendant."

The petitioner introduced ample evidence to show that the back-up movement on slow siding which caused the death of Tiller was an unusual movement, and for that reason he was not looking for the approach of the cars. Wamack, the switchman on the yard testified that the movement was necessary because certain cars had to be reclassified. In other words, certain cars had been erroneously placed in making up the train at Byrd Street Station and this error had to be corrected by changing the position of the cars when the train reached Clopton Yard (R. 19, 20, 36, 37). Certainly, it cannot be true that such errors are customary or usual, for the railroad would not keep a classification employee in its employ if he customarily or usually made such mistakes. The cars were not backed into slow siding unless a reclassification of the cars was required, and the testimony indicates that such a movement was not necessary even when a reclassification was required (R. 52).

Myrick, the engineer on the engine which caused the injury, testified that he had been on this particular assignment about fifty times (R. 28), and that never before in all his experience had he made the back-up movement on slow siding (R. 24). Wright, the fireman on Myrick's engine, had made this particular run fifteen or twenty times and had never made the back-up movement on slow siding. In answer to an inquiry on this question, he stated (R. 58):

"No, sir, I had always got in the clear on the south side."

Dickens, the brakeman on the train, had been on that assignment from twelve to twenty times and "had never been in slow siding before" (R. 49, 51). Although Wamack, the switchman, testified that the movement was not unusual, in his cross-examination he stated:

> "When I dropped off here to make the usual cut of Second 209, I had to hold on to two more cars, being informed by Yardmaster W. J. Jones that we had a classification to make. So instead of making the cut where I was going to make it, I had to drop back two more car lengths." (R. 41.)

It is of particular significance that although Tiller had been on this run for sixteen years, when he regained consciousness after being extricated from the wheels of the car, his first remarks were to ask what hit him and how he got hurt (R. 23), thus clearly indicating that the movement was unusual and unexpected by him. On this issue the case of petitioner is strengthened by the presumption that Tiller in standing on or near the slow siding would look and listen for a train in the direction from which he had reason to expect it. *Chesapeake & O. Ry. Co.* v. *Peyton,* (1918) 4 Cir., 253 F. 734, at 735.

The opinion of Judge Soper in the court below admits that there was some evidence on the part of the petitioner that there was an error in the classification of the cars at Byrd Street, which necessitated the classification at Clopton Yard and that there was also evidence on the part of employees on the cars from Acca Yard that they had not made this particular movement on prior occasions (R. 72). Counsel for the petitioner contend that the evidence was sufficient to justify a reference to the jury on the issue as to whether the movement in question was such as to place the case under the well

recognized exception to the assumption-of-risk doctrine which, even under the old rule existing prior to the 1939 amendment to the Act, required adequate warnings to be given by railroads to their employees and proper lookout to be kept for them in cases of unusual movements in their yards. *Jacob* v. *New York City*, (1942) 315 U. S. 752, 62 S. Ct. 854.

VII.

CONCLUSION.

In conclusion, counsel for the petitioner respectfully submit:

1. That under the Federal Employers' Liability Act, as amended on August 11, 1939, the common law doctrine of assumption of risk has no application to this case.

2. That petitioner's evidence of negligence on the part of the respondent was more than sufficient to justify reference of the case to the jury.

3. That the defendant was negligent as a matter of law, which entitles the plaintiff to a recovery under the Act.

4. That independently of the question of the applicability of the doctrine of assumption of risk, the evidence presented by the petitioner was sufficient to justify the submission of the case to the jury on the issue as to whether the movement of the train which caused Tiller's death was so unusual as to require proper lookout for and adequate warning to him.

5. That the Judge of the District Court erred in refusing to submit the case to the jury on the issues of fact and in directing a verdict for the defendant, and that

the United States Circuit Court of Appeals, Fourth Circuit, erred in affirming that action and refusing to remand the case for a new trial.

6. That the decision of the Circuit Court of Appeals should, therefore, be reversed by this Honorable Court and the case remanded for a new trial.

Respectfully submitted,

J. VAUGHAN GARY,
RICHMOND MOORE, JR.,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTRIX OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

THOMAS W. DAVIS,
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J. M. TOWNSEND,
Petersburg, Virginia;
COLLINS DENNY, JR.,
Richmond, Virginia,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, Executrix of the Estate of John Lewis Tiller, Deceased,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Opinions Below.

The District Court handed down no written opinion. Its order is found on page 66 of the Record. The opinion of the Circuit Court of Appeals is reported in 128 F. (2d) 420, and is found on pages 69, et seq., of the Record. The judgment of the Circuit Court is found on page 77 of the Record.

Questions Involved.

Two questions are involved:

(1) Did the death of petitioner's decedent result in whole or in part from the negligence of any of respondent's officers, agents or employees?

(2) If the foregoing question be answered in the negative, does the amendment of August 11, 1939, to the Federal Employers' Liability Act render respondent liable in damages for that death?

Statement of the Case.

The facts are correctly summarized in the opinion of the Circuit Court of Appeals (R. 69). Many of the facts are accurately stated in the petition, but others are inaccurately stated and certain essential facts are omitted. In order that the Court may have the page references to the Record, we call attention to inaccurately stated and omitted facts.

The deceased was last seen before the accident by Switchman Wamack in Byrd Street Yard, in Richmond, about 6:15 p. m. (R. 34) just before the cut of cars from Byrd Street Yard left for Clopton Yard. He was next seen at 7:15 p. m. when he was found caught up between the brake-shoe and hanger (R. 23, 35, 67) of the lead car in the back-up movement into slow siding made by Train 209, which had stopped at Clopton Road in Clopton Yard, Chesterfield County, Virginia. No witness saw him in the interval and no witness saw him in Clopton Yard until after the accident. Accordingly, no witness was able to testify concerning the circumstances of the accident.

It was the duty of Mr. Tiller to see that the cars were sealed (R. 15). It is correctly stated in the petition (p. 4) that in performing this duty he followed no routine. The evidence, however, does not justify the statements made by petitioner that "he usually stood somewhere near Clopton Road Crossing to check the seals on cars as they passed southwardly on the southbound main line" (p. 4); and "he usually stood at or near the point where he was on this occasion" (p. 5). The evidence shows that from

time to time, on other occasions, he had been seen doing his work "at various places" in Clopton Yard (R. 26); near the point where Clopton Road crosses the tracks (R. 26); north of Clopton Road (R. 25-26); in the yard south of Clopton Road (R. 35). Amid the witnesses there was only one witness, i. e. Switchman Wamack, who, through the years, had worked repeatedly in and out of Clopton Yard. He said: "I have seen Mr. Tiller all over the yard, from one end to the other". "I have seen him all over the yard—in other words, from the lower end of Clopton Yard all the way to Byrd Street Station" (R. 35).

On page 5 of the petition, it is said that Sergeant Tiller "was standing to the east of the back-up movement and facing eastwardly", and reference is made to Record pages 21, 29, 30 and 64. The Record does not support this statement. No one knows whether Mr. Tiller was standing at or near slow siding, or whether he was struck as he swung off the cut of cars from Byrd Street, or whether he slipped from that cut of cars and fell; and if he were standing on or close to slow siding, no one knows which way he was facing. It is significant that three witnesses, to-wit, Brakeman Dickens (R. 48), Fireman Wright (R. 59) and Switchman Wamack (R. 42-43) were in a position to have seen the reflection of the deceased's flashlight, had he been flashing his light on the seals of cars as they passed at or near this point. No one of them saw any such indication (R. 53, 58-59, 43). The first indication that anyone had been there was when Fireman Wright saw a burning flashlight lying on the ground (R. 22, 56, 57), and upon investigation by Engineer Myrick and himself, the light, the cap, the pistol and the deceased were found (R. 22, 57).

On page 5 of the petition, it is said that "the engineer, fireman and brakeman all testified that they had never before made or seen a back-up movement northwardly on slow siding," and reference is made to Record pages 24, 49 and

58 in support of this statement. It is later argued in petitioner's brief (p. 18) that the back-up movement into slow siding was therefore an unusual movement.

The engineer (R. 24) states that he had never made this movement before. The brakeman testified (R. 49) that he had never before been in slow siding. The fireman testified (R. 58) that he had never made this back-up movement before, but had always gotten "in the clear on the south side".

Further, the engineer stated that prior to the death of Mr. Tiller, months would go by during which he (the engineer) was not in Clopton Yard (R. 28), and that for a couple of years prior to Mr. Tiller's death he (the engineer) was in the yard perhaps two or three times a month (R. 28). At the time of Mr. Tiller's death, the fireman had been working for respondent for about three years, and during that time he had been in Clopton Yard not more than twelve or fifteen times (R. 58). The brakeman had been employed for approximately three and one-half years, and had been in Clopton Yard only a dozen or twenty times (R. 51). These three witnesses, accordingly, knew little of what ordinarily took place in Clopton Yard. But there were two of petitioner's witnesses who had been in the yard on many occasions. Switchman Wamack had been assigned to the make-up of this particular freight train off and on from 1921, and during the two or three years prior to Mr. Tiller's death, he had been assigned to that work at least half the time (R. 37). He testified that the back-up movement into slow siding was in no sense "unusual" (R. 37), but that it might be made ten to fifteen times in one month, and again it might not be made for a considerable period of time (R. 38). Sergeant Angle, a police officer assigned to the same class of duties as Mr. Tiller, had once been on this run regularly and thereafter, from time to time, had ridden this particular freight train with Sergeant

Tiller. He testified that he had seen such back-up movements made (R. 50).

It is stated on page 3 of the petition that the back-up movement into slow siding was necessary because an error in classifying cars was made at the Byrd Street Station. This statement is not sustained by the testimony. It is true that a car in the cut of cars from Byrd Street Station had to be shifted to a different position, i. e., classified. But, the evidence shows that Clopton Yard is a "classification" yard maintained in part for the purpose of "classifying" freight cars (R. 29, 40, 51, 52), and is used regularly each evening for the purpose of making up two freight trains from the South, one a through freight train, the other a local freight train. Cars from north of Richmond are assembled in Acca Yard north of Richmond and are brought by a road engine and crew to Clopton Yard (R. 7). Richmond cars for both the through freight and the local freight are assembled in the Byrd Street Yard in the City of Richmond, and are carried by a yard engine to Clopton Yard (R. 30). When these two cuts of cars reach Clopton Yard, the through freight is then assembled (R. 30) with cars for Weldon, North Carolina, immediately behind the engine, cars for Petersburg, Virginia, in the middle, and cars for Rocky Mount, North Carolina, and points south of Rocky Mount at the end (R. 42), and the road engine and crew takes this through freight train south. As the cut from north of Richmond and the cut from Richmond must be consolidated, in part, into the through freight train and, in part, into the local freight train which leaves later, classification in Clopton Yard, not only of this particular train, but of other trains, is a normal and natural thing, and in doing this work, cars, of necessity, must be shifted back and forth (R. 29, 40, 51, 52); and in doing this work, one set of tracks will be used at one time, and another at another, as convenience may dictate (R. 43).

The distance from the center of the track on slow siding to the center of the track on southbound main line is 13 feet, which is the standard distance (R. 46). When hopper cars are on one track and ordinary cars are on the other track, the clearance between the sides of the cars is 3 feet 7½ inches (R. 45), and when hopper cars are on both tracks, the clearance is 3 feet 3½ inches (R. 45). The overhang of a hopper car is thus 4 inches more than the overhang of an ordinary car.

ARGUMENT.

Summary of Argument.

1. There was no negligence upon the part of respondent which resulted in the death of the deceased, and the District Court properly sustained the motion to direct a verdict.

2. Congress, by the 1939 Amendment to the Federal Employers' Liability Act, limited the withdrawal of the defense of assumption of risk to negligence of the carrier and did not impose any new or higher duties on it.

I.

There was no negligence upon the part of respondent which resulted in the death of the deceased and the District Court properly allowed the motion to direct a verdict.

The alleged grounds of negligence are set forth in paragraph 4 of the complaint (R. 2) and are seven in number, to-wit: (1) failure to keep a proper lookout; (2) failure to give proper signals of the approach of the cars; (3) failure to keep the head car properly lighted; (4) failure to warn deceased of an unprecedented and unexpected change in the manner of shifting the cars; (5) failure to operate the train, engine and cars in a careful and prudent manner under the existing circumstances; (6) failure to furnish

deceased with a reasonably safe place to work; (7) failure to furnish prompt medical attention to the deceased. The petitioner abandons the seventh ground.

The fourth allegation, to-wit, an unprecedented movement, is the subject of a special section of petitioner's brief, beginning on page 17. The other five grounds are grouped together by her beginning on page 15 of her brief, and the specific acts on which negligence is predicated are that the backup movement into slow siding was made (1) without lights; (2) without a lookout; (3) without adequate warning; (4) in an unlighted railroad yard, (5) the tracks of which were located too closely together.

Since petitioner primarily predicates her allegation of negligence upon the alleged unusual movement, to-wit, a back-up movement into slow siding, we shall deal first with that point. We concede the rule implied in *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, and implied and set forth in other cases, to the effect that if an employee in a classification yard is exposed to some unusual danger by reason of an unusual movement of trains or a departure from a general practice followed in the yard, and if the employer gives him no warning thereof, the employer is guilty of negligence. It is not necessary to restate the evidence heretofore briefly summarized. It is sufficient to state that the rule has no application to the instant case, because the evidence shows (and all the evidence was the evidence of petitioner and her witnesses) that there was no unusual movement or departure from a practice generally followed.

We group together the allegations concerning lights, lookout and warning. No one of those allegations is supported by the evidence.

Brakeman Dickens rode on the lead car of the back-up movement, holding to the ladder on the west side of it at the extreme lead or north end of the car. He had a lighted lantern in his hand and was waving it in a horizontal circu-

lar motion (R. 48). He alighted about the middle of Clopton Road (R. 49) within a few feet of the point where petitioner's decedent was struck. While he was riding the car, and when he stepped off of the car on to Clopton Road, he was facing north (R. 54). Thus, there was a light on the lead end of the back-up movement and a lookout was there.

We do not mean to say that Dickens rode the head end of this movement with his lantern for the purpose of maintaining a specific lookout for some workman, or to warn the workman. But, the evidence shows that he was there and the light was there for any person to see.

The evidence shows conclusively that the automatic bell on the engine propelling the back-up movement was ringing during the whole of that movement (R. 30, 59). An adequate warning was therefore given.

The allegations concerning lights, lookout and warning are thus not supported by the evidence, but even if they did find support in the testimony of petitioner's witnesses, a verdict should still have been directed, because a railroad company does not owe to its employees working in a classification yard the duty of maintaining lights, providing lookouts and giving warning of the movement of trains back and forth. Time after time this Court and the lower federal courts have so held—see *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *C. & O. Ry. Co.* v. *Nixon*, 271 U. S. 218; *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165; *Delaware Etc. R. R. Co.* v. *Koske*, 279 U. S. 7; *Fernand* v. *Boston & M. R. R.*, 2 Cir., 62 F. (2d) 782; *Connelly* v. *Pennsylvania R. Co.*, 3 Cir., 201 Fed. 54; *Southern Ry. Co.* v. *Verelle*, 4 Cir., 57 F. (2d) 1008; *N. & W. R. Co.* v. *Collingsworth*, 6 Cir., 32 F. (2d) 561.

Finally, we deal with the allegation that petitioner's decedent was not furnished a reasonably safe place to work, and with the specific points urged in support thereof,

namely, that Clopton Yard is not lighted and that the space between the tracks is too narrow.

It is true that Clopton Yard is an unlighted yard, and it is true that every classification yard is a place of inherent danger, made so, of necessity, by the character of work which must there be done. But there is not a line of evidence tending to show that Clopton Yard is any more dangerous than any other classification yard, and common observation tells us that few such yards are lighted. This Court has held that a railroad company owes no duty to employees working in a classification yard to light that yard. In *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, the injured employee was working in an unlighted yard, but it was found as a matter of law that the railroad company was guilty of no act of negligence.

As heretofore pointed out, the clearance between the southbound main line track and slow siding is the regular standard clearance (R. 46), and when hopper cars are on slow siding and other cars are on southbound main line, the clearance between the sides of the cars is 3 feet, 7½ inches (R. 45). The spacing of tracks and other engineering questions of that character are matters of which carriers have a large freedom of choice, and the "courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries". *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 170. See also *Randall* v. *B. & O. Ry. Co.*, 109 U. S. 478; *Tuttle* v. *Detroit Etc. R. Co.*, 122 U. S. 189; *B. & O. Rwy. Co.* v. *Groeger*, 266 U. S. 221; *Delaware Etc. R. R. Co.* v. *Koske*, 279 U. S. 7. It might also be pointed out that in the *Toledo* case the clearance was 2 feet, 9 inches, without considering grab irons. This court held in the *Toledo* case that the clearance therein questioned raised no inference of negligence.

It will have been noted that the testimony in the instant case fails to show how the decedent met his death, and that petitioner's hypothesis is supported by little, if anything, except the place where the body, the cap, the pistol and the flashlight were found. In the quite similar case of *Kansas City Southern Rwy. Co. v. Jones*, 276 U. S. 303, the Court said that the hypothesis there was supported "by little, if anything, except the place where the body and the lantern of the deceased were found". Mr. Justice Holmes, who delivered the opinion in that case, stated the facts as follows:

> "This is an action under the Employers' Liability Act for the death of one R. D. Ferguson who was a car inspector on the petitioner's road. No one saw the death, but only the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little, if anything, except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witnesses say was not rung on this occasion. The court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before 7 in the evening, so far as time can be fixed. The train passed at five minutes after 7, the time at which it was known by him to be due. His body was found at twenty-five minutes after 7. He was an experienced man."

This Court held upon those facts that there could be no recovery, and it stated:

> "Nothing except imagination and sympathy warranted a finding that the death was due to the negli-

gence of the petitioner rather than to that of the man himself."

We respectfully submit, therefore, that the evidence in the instant case fails to prove any act of negligence on behalf of respondent.

II.

Congress, by the 1939 Amendment to the Federal Employers' Liability Act, limited the withdrawal of the defense of assumption of risk to negligence of the carrier and did not impose any new or higher duties upon it.

The Employers' Liability Act of 1908 provides that every common carrier by railroad while engaging in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, (1) for such injury or death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier, or (2) by reason of any defect or insufficiency, due to *its negligence*, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

The Act was amended by Public No. 382, 76th Congress, Chapter 685, 1st Session, S. 1708, being an Act approved August 11, 1939, to Amend the Federal Employers' Liability Act. The pertinent part of this Act in reference to any amendment to the doctrine of assumption of risk, is Section 4, which reads as follows:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier; and no em-

> ployee shall be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." (Italics ours.)

It will be noted that the only part of this amendment which has reference to this case is as follows:

> "• • • such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier." (Italics ours.)

It will be observed that the two clauses in the original Act relate solely to the carriers' *negligence*, and it will also be observed that the Amendment of 1939 regarding the question of assumption of risk also refers to "the *negligence* of the officers, agents, or employees of such carrier". (Italics ours.)

It will, therefore, be seen that Congress, by this language, *limited* the withdrawal of the defense of assumption of risk to matters which involved *only* the *negligence* of the officers, agents, or employees of such carriers, and the Court cannot imply to this language an intention upon the part of Congress to *extend* this language to the doctrine of assumption of risk upon the part of employees when *no* negligence of the carrier is proven.

Nowhere in this Amendment can be found any language showing an intent by Congress to *impose any greater duties* or *new standards* of conduct in the operation of railroads upon carriers. The language of the Amendment is language *limiting* the defense of assumption of risk; that language does *not impose*, as argued in petitioner's brief (p. 13), any *new* or *higher duties* upon carriers. As said by the Circuit Court of Appeals in its opinion, 128 F. (2d) 424, (R. 76):

"The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, the doctrine of the assumption of the risk must be given its accustomed weight. *It is beyond the power of this court to deny the defense in this case.* It presents no material difference of fact from situations considered by the courts in numerous decisions and held to be free from negligence on the part of the carriers, *and we have no authority to prescribe new standards of conduct* in the important field of railroad operations. See *Delaware, etc., R. Co. v. Koske*, 279 U. S. 7, 11, 49 S. Ct. 202, 73 L. Ed. 578; *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 170, 48 S. Ct. 215, 72 L. Ed. 513." (Italics ours.)

Congress has never set up a standard by which carriers must construct their yards. The carriers have freedom of choice in providing facilities and places for use of their employees, and the courts have not as yet prescribed the space to be maintained between tracks in switching yards. This is an engineering problem which the courts have left to the sound judgment of the carriers.

Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 165, 169.

The Court says, page 169:

"The work of checking cars in a yard at night where switching is being done is necessarily attended by much danger. But fault or negligence may not be inferred from the mere existence of danger or from the fact that plaintiff was struck and injured by the moving car. Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against

the defendant. *Missouri P. R. Co.* v. *Aeby*, 275 U. S. 426, ante, 351, 48 Sup. Ct. Rep. 177. The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant *an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 529, 69 L. Ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle* v. *Detroit G. H. & M. R. Co.*, 122 U. S. 189, 194, 30 L. Ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; *Randall* v. *B. & O. R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003, 3 Sup. Ct. Rep. 322; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks. *Missouri P. R. Co.* v. *Aeby, supra.* The court erred in submitting that question to the jury." (Italics ours.)

Again, the Court says, page 171:

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz* v. *Humphreys, supra.*"

It is clear, therefore, that petitioner's view that the amendment enlarges the duties of carriers is altogether erroneous. All the amendment does is to deprive carriers of a defense theretofore available to them in certain cases in which they were negligent. The facts, and the decision of the Court in the *Allen* and other like cases, show that this Court had, prior to the Amendment of 1939, construed the doctrine of assumption of risk to apply to two classes of cases, to-wit: (1) to a case in which the carrier was negligent, and the employee was aware, or should have been aware thereof and the risk arising therefrom; and (2) cases in which the carrier was not negligent, but the employment was necessarily fraught with danger.

It is presumed that Congress was well informed of this fact when this amendment was brought before it.

In the case of *Seaboard Air Line* v. *Horton*, 233 U. S. 493, 504, the court, after discussing the doctrine of contributory negligence, says:

> "On the other hand, the assumption of risk, even though the risk be obvious, *may be free from any suggestion of fault or negligence on the part of the employee.* The risks may be present, nothwithstanding the existence of all reasonable care on his part. Some employments are *necessarily* fraught with danger to the workmen—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not." (Italics ours.)

This was the law as laid down by the court, therefore, in 1939 when this amendment was passed.

The amendment dealt with the question of the carriers' negligence, and eliminated the defense in a case of negligence. It did not attempt to deal with the case of no negligence.

The history of the amendment is as follows:

On March 13, 1939, there was introduced into the 76th Congress, 1st Session, H. R. 4988, by Mr. Healy, "A Bill to Amend an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases', approved April 22, 1908, (U. S. C., title 45, sec. 51)". This bill provided that every common carrier by railroad while engaging in commerce between the States shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, etc.,

> "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case *where said employee has not had actual notice of any negligently maintained condition or practice* where the negligence of such common carrier, its officers, agents, or employees, proximately contributed to the injury or death of such employee except those risks incident to the employment."

On the same date, in the Senate, Senate Bill 1708 was introduced by Senator Neely, providing for liability for damages in such cases, Section 1 of which provided:

> "* * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its

cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier any portion of whose duties as such employee shall be the furtherance of or in any way affecting interstate or foreign commerce as above set forth, or whose duties as such employee shall be in any degree incidental thereto, shall be considered, for the purposes of this chapter, as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

And Section 4 of the Bill provided:

"SEC. 54. ASSUMPTION OF RISKS OF EMPLOYMENT.—In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

On July 18, 1939, Mr. Walter, from the Committee on the Judiciary of the House, submitted a report to accompany H. R. 4988, which was the House Bill, in which the House Committee suggested certain changes. In this report the Committee says:

"However, the provisions of the Bill do not abolish the defense (assumption of risk) but only modifies it in certain particulars."

Further in the report, the Committee says:

"All that is sought to be done is to prevent the employer from casting the burden upon the employee, with respect to a negligently maintained condition

through devices and methods described. In all other respects the doctrine of assumption of risk still persists."

The Senate Bill was referred to the Committee on the Judiciary, and Mr. Neely, on June 22, 1939, submitted report to the Senate to accompany S. 1708. In that report the Committee says:

"It is the aim of the bill to amend the Employers' Liability Act in three particulars:

"1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce.

"2. It abrogates the defense of assumption of risk in cases where *injury or death is caused by the negligence of a carrier* and makes the *doctrine of comparative negligence applicable instead.*" (Italics ours.)

In commenting on the amendment to Section 4, the Committee says, on page 3 of the report:

"Under Section 4 of this chapter, as it now reads, no compensation can be obtained for any injury to an employee or for an employee's death caused by unsafe or dangerous conditions, which resulted from the *negligence* of the employer, his agents, or servants if the court finds, in the circumstances, that the employee knew, or should have known, of the danger involved." (Italics ours.)

In Conference Report No. 1463, 76th Congress, 1st Session, to accompany S. 1708, Mr. Celler, Chairman of Managers on the part of the House, among other things, advises as follows:

"The Senate bill provided that in actions brought under the Employers' Liability Act, employees shall not be held to have assumed the risks of their employment where injury or death results in whole or in part

from the *negligence* of the carrier. The House amendment limited this provision to cases where the employee had not had actual notice of a *negligently* maintained condition or practice. The conferees agreed to the provisions of the Senate bill." (Italics ours.)

These reports clearly demonstrate the fact that both branches of Congress were advertent to the fact that the bill changed the doctrine of assumption of risk only where the carrier was *negligent* through its officers, agents, or employees.

At common law the doctrine of assumption of risk by an employee was applied without regard to negligence either on his part or the part of the employer. At common law a master was not responsible to his servants for injuries not arising from his neglect, but which were inherent in the nature of the business. The employee assumed the risk of these dangers and assumed such risk when he had knowledge that his safety was in danger by some neglect on the part of his employer of which he had knowledge and continued to work without complaint to his employer and without the promise on the part of his employer to repair or remedy such danger. It was shown in the reports of Congress that in the case of *Hall* v. *Pennsylvania R. Co.*, 6 C. C. A., 30 F. (2d) 594, plaintiff was denied recovery and was held to have assumed the risk of his employer's negligence in failing to furnish a safety belt, although he had demanded it and afterwards proceeded to go to work without a belt only when threatened with discharge. The report referred to this case as being harsh and it was this class of dangers which Congress was endeavoring to eliminate. Its purpose was to enlarge employees' protection by providing that in all cases where the injuries resulted from the *negligence* of the employer, or his fellow servants, the doctrine of assumption of risk should not be available. The situation cannot be clearer put than it is in the opinion

of the Circuit Court of Appeals in this case, page 424 (R. 76):

> "It is significant that Congress made no provision in the amendment with respect to the other risks to which railroad workers are exposed, namely, the ordinary risks inherent in railroading despite the use of the required safety appliances and the exercise of due care by a carrier for the protection of its men. The amendment speaks only of injuries resulting from the carrier's negligence, *and does not attempt to raise the standard of care required of a carrier* with respect to the safety of its employees in the performance of their duties in railroad yards and other places of danger. The omission is especially noticeable in view of the pains which Congress has taken from time to time in the passage of statutes for the protection of railroad employees. See the Safety Appliance Acts, 45 U. S. C. A. Section 1-16." (Italics ours.)

Conclusion.

The absence of any negligence by respondent proximately causing decedent's death has been established, not only by the verdict and judgment for respondent which was affirmed by the court below, but, also, by the substantially undisputed evidence in the record, coming from petitioner's own witnesses, as we have pointed out in the first part of this brief. If there is no substantial evidence of negligence in the record, the respondent cannot be held liable for decedent's unfortunate death, since it is elementary law that proof of negligence is essential to establish liability under the Federal Employers' Liability Act in cases where the Safety Appliance Act are not involved. The question of respondent's liability under the recent amendment to the Federal Employers' Liability Act abolishing the defense of assumption of risk of injury or death arising from the carrier's negligence, which was put into

the case by the petitioner and commented on by the court below, is, therefore, not properly in the case; unless at least petitioner can establish that the purpose and effect of the amendment was to establish new duties and obligations by the carrier to its employees which did not exist when the amendment was adopted. Respondent has attempted to show in the second part of this brief that this was neither the purpose, nor the effect of the amendment. Both the legislative history of the amendment and the specific language of the amending and amended statutes clearly negatives such idea.

Respondent, therefore, submits that the petition herein should be denied.

Respectfully submitted,

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August 31, 1942.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 296

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT.

THOMAS W. DAVIS,
Wilmington, N. C.;
J. M. TOWNSEND,
Petersburg, Virginia;
COLLINS DENNY, JR.,
Richmond, Virginia;
Counsel for Respondent.

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Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY.

BRIEF FOR RESPONDENT.

I.

Statement of Case.

Respondent relies upon the brief which it has filed herein in opposition to the petition for writ of certiorari, but desires to call the Court's attention to the brief filed by the petitioner since the writ of certiorari was granted. In the brief which we filed we set forth with particularity that part of the evidence which we think was not accurately set out by the petitioner. In petitioner's new brief, on page 5, it is said:

> "Another employee infers that the movement was an unusual one (R. 41)."

We do not think the record bears out this statement. The deceased was a railroad policeman who inspected cars on the Clopton Yard to see whether they were sealed. He was killed on the Clopton Yard. The last time he was seen before the accident was by Switchman Wamack in the Byrd Street Yard in Richmond about 6:15 P. M., just before through Freight Train No. 209 left Byrd Street Yard (R. 34) for Clopton Yard.

In order that the Court may have a picture of the movement of this train and of the yard train, we have attached hereto a map which conforms to the evidence of Engineer Myrick, Switchman Wamack and Brakeman Dickens. This movement has been described in both of the briefs, properly paged to the testimony.

Acca Yard is a yard of the Atlantic Coast Line Railroad Company and the Richmond, Fredericksburg & Potomac Railroad Company (R. 16) north of Richmond, and Clopton Yard is a classification yard of the Atlantic Coast Line Railroad Company south of Richmond (R. 16).

It is shown by the evidence that the deceased was found under the wheels of the rear end of the head car of Train No. 209 after it had stopped with the tender on Clopton Road (Wamack R. 22). When Train No. 209 left Acca Yard it had 15 cars. It went south and stopped on the main line north of Clopton Yard, on the brow of the hill, opposite the yard office, at the point marked "A" shown on the map attached to this brief as "Exhibit A". Engineer Myrick cut off 3 cars on the head of his train and ran down to the switch crossover to slow siding, marked "B" on the map, the direction being shown by a red line on the map. He then backed north into slow siding, partly across Clopton Road, to stand out of the way of the yard engine which had come from South Richmond, on the southbound main line, so that the yard engine, with the additional cars which were to go in Myrick's train, then standing on the brow

of the hill near the yard office, could be backed on to the rear portion of Myrick's train (R. 52).

The engine on Train No. 209 was a *road* engine (R. 16, 39).

In order to make the movement above described, the yard engine, with its cars, would have to come south, down the southbound main line track to the crossover, marked "C" on the map, and then back through this crossover and over the switch marked "B" on the map, crossing Clopton Road to couple to the cars on the brow of the hill in Train No. 209. The movement of this yard engine is shown in yellow on the map.

As the road engine with 3 cars attached backed north on slow siding, it got out of the way of the yard engine and its cars, and stopped with the tender on Clopton Road (R. 52). On this movement Dickens, the brakeman on Train No. 209, rode on the head of the lead car on the west or left-hand side of the car as it was moving, and stepped off in the middle of Clopton Road. He took a few steps in the direction the train was moving and then turned and walked back to throw the switch, marked "B" on the map, so as to enable the yard engine, which came in on the southbound main line, to back on to the rear portion of Train No. 209 without having to stop to change the switch (R. 48).

After Engineer Myrick had stopped Train No. 209, and Dickens, the brakeman, had gone ahead south to throw the switch, the fireman, Wright, looked out of the engine cab window on the east side, or engineer's side, and saw a light. He got down off the engine with his flashlight. He shined his flashlight on the road and saw a flashlight lying between slow siding and the southbound main track just north of Clopton Road. This flashlight was found just a few inches from the southbound main line track. It was lighted and showed a little beam of light about 18 inches long and was between the southbound track and slow siding. He found

the cap underneath the second car or middle car. It was lying on the end of the crossties and Tiller's gun was found lying up farther, which means farther north (R. 57). He and Myrick then walked a little farther and found Tiller under the wheels of the head or third car from the engine (R. 22).

No one saw Tiller after the train left Richmond, until he was found by Wright and Myrick.

II.

Questions Presented.

In the petition for writ of certiorari and in petitioner's brief filed since the writ of certiorari was granted, petitioner presents only three questions, to-wit:

1. Whether there was sufficient evidence of negligence in this case to be submitted to the jury under the Federal Employers' Liability Act.

2. Whether, by reason of the amendment to the Federal Employers's Liability Act, the deceased assumed the risk.

3. Whether there was sufficient evidence of an unusual movement of the train to take the case to the jury upon the ground that it constituted an exception to the rule under the Federal Employers' Liability Act.

However, in the summary of argument, page 8 of petitioner's new brief, petitioner sets out a new question, or argument, as follows:

> "3. Respondent was negligent as a matter of law because of its failure to equip its locomotive with proper lights as prescribed by the Federal Boiler Inspection Act and the Rules of the Interstate Commerce Commission adopted pursuant thereto."

This question is now raised for the first time; was not pleaded; was not advanced before the District Court or the Circuit Court of Appeals; and was not suggested in the petition for writ of certiorari.

III.

Summary of Argument.

1. There was no negligence upon the part of respondent which resulted in the death of the deceased and the District Court properly sustained the motion to direct a verdict, and the Circuit Court of Appeals properly affirmed.

2. Congress, by the 1939 amendment to the Federal Employers' Liability Act, limited the withdrawal of the defense of assumption of risk to negligence of the carrier and did not impose any new or higher duties upon it.

3. Petitioner cannot, or may not, for the first time in this Court raise a question of law or evidence not pleaded, not set forth in the complaint, not advanced before the District Court nor the Circuit Court of Appeals, and not suggested or advanced in the petition for certiorari.

IV.

ARGUMENT.

Respondent relies for argument upon its brief in opposition to the petition for writ of certiorari, on points one and two in its Summary of Argument, and does not deem it necessary to reprint same.

However, we desire to call the Court's attention to the following paragraph found on page 16 of petitioner's brief upon his argument that there was sufficient evidence of

negligence to justify the submission of the case to the jury. This statement is as follows:

> "Many railroad yards are equipped with flood lights; the rules of some railroads require a light on the head car of all back-up movements; the rules of some railroads require the placing of an employee on the head of each back-up movement for the entire length of the movement to serve as a lookout to employees and others in positions of danger. Had the respondent taken any of these precautions for the safety of its employees, the death of employee Tiller would not have occurred."

A search of the record in this case will reveal no such testimony therein, and, therefore, petitioner can not rely on this statement of fact for the Court to consider, and respondent asks that this portion of petitioner's brief be stricken.

V.

Petitioner may not, for the first time in this Court, raise a question of law or evidence not pleaded, not set forth in the complaint, not advanced before the District Court nor the Circuit Court of Appeals, and not suggested or advanced in the petition for certiorari.

Counsel for petitioner frankly state on page 18 of petitioner's brief that they are presenting to the Court, under the above caption, a contention which has not been urged heretofore in these proceedings, but states the contention there advanced is merely an additional argument on the question of negligence which was specifically brought forward in the petition for writ of certiorari. They claim that it does not present a new issue, but furnishes a new and different approach to the main issue of negligence, upon which petitioner has relied from the institution of this suit. Petitioner then sets up the Federal Boiler Inspection Act, 45 U. S. C. A., Sec. 22, and Rules 129, paragraphs (a),

(b), (c) and (d), and Rule 131, promulgated by the Interstate Commerce Commission under the Boiler Inspection Act, and argues that the locomotive which caused the death of the employee, Tiller, was a locomotive used in *yard* service between sunset and sunrise and was subject to the provisions of Rule 131 of the Commission, and cites for authority the case of *C. & O. Ry. Co.* v. *Wood*, (1932), 6 C. C. A., 59 Fed. (2d) 1017. Petitioner then argues that the road engine in the instant case should have been equipped with lights as prescribed by Rule 131 of the Interstate Commerce Commission, which is the rule prescribing the requirements for locomotives used in yard service.

It is a significant fact that there is no allegation in the complaint of negligence upon the part of respondent based upon the Boiler Inspection Act. Indeed, in article 2 of the Complaint it is specifically alleged that the action is brought under and pusuant to the provisions of 45 U. S. C. A. Section 51-60, and acts amendatory thereto, known as the Federal Employers' Liability Act. The action is in no wise predicated upon a defect in the engine but is predicated upon respondent's alleged negligence in that

> "they failed to keep a proper lookout for him, to give proper signals warning of the approach of the train, to keep the head *car* properly lighted, or lighted at all, to warn deceased of a hitherto unprecedented and unexpected change in the manner of shifting the cars although they knew full well that such a change would place him in a position of extreme danger, if he were not so warned, to operate their train, engine and cars in a careful and prudent manner under the circumstances then and there existing, to furnish deceased a reasonably safe place in which to work, and in other respects and particulars, by reason of and as a result of all of which a car propelled by defendant's engine and operated by its crew ran up against, struck, dragged, ran over, crushed and mangled decedent." (Italics ours.)

These allegations of the complaint exclude any alleged violation of the Boiler Inspection Act. No reference to that Act or the rules promulgated thereunder was made by the plaintiff in the courts below nor by petitioner heretofore in any respect in this Court.

In the first place, the engine of Train No. 209 was a road engine and not a yard engine. Plaintiff's witnesses Myrick (R. 16), Wamack (R. 39) and Dickens (R. 52). Witness Wamack's statement (R. 39) shows the distinction between a yard engine and a road engine. To the same effect is the testimony of the witness Dickens (R. 52). So that there was neither allegation nor proof of negligence coming within the terms of the Boiler Inspection Act.

Petitioner relies upon the case of *C. & O. Ry. Co.* v. *Wood*, supra, as authority for the application of Rule 131 of the Interstate Commerce Commission set forth on page 21 of petitioner's brief. Rule 131 is headed "Locomotives used in yard service" between sunset and sunrise, and not a word is said in that rule in regard to road engines. The rule in regard to road engines is Rule 129 set forth on page 20 of petitioner's brief, and paragraph (a) of Rule 129 is the only one that has any reference to any evidence in this case. There is no evidence throughout the entire record to show that the locomotive of Train No. 209 was anything except a locomotive used in road service, and there is no evidence to show that any portion of that locomotive did not come up to the standard described in Rule 129 (a). Rule 129 (b) reads as follows:

> "Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements."

As we have pointed out, the evidence shows that this was a road engine and it further shows that it had to pick up a detached portion of its train. However, this locomotive was not running backward, as the term is implied in Rule 129 (b), but it was pushing three cars ahead of it. In this movement a head light on the rear would be of no use because the cars would obscure the light, and it is claimed and the evidence shows that if Tiller was struck by Train No. 209 it was not when the engine was running backward but it was when the engine was pushing the cars.

In the case of *C. & O. Ry. Co.* v. *Wood*, supra, engine No. 1509 had been in part *yard* service five or six months, was not equipped with a rear headlight, and for that reason the Court held the Railroad Company liable. The Court says, page 1019:

> "• • • we think that the indisputable nature of the evidence requires the conclusion that engine 1509 was being used wholly within the yards for the purpose of building or making up the train to be pushed to Alleghany. • • • Nor was it being operated in a 'terminal movement'. This means a movement at terminals to and from service without other immediate duties to be performed. The doing of switching in a yard is not, we think, such a terminal movement and an engine while so engaged is in 'yard service'."

The locomotive in the case at bar, however, was not used in yard service and there is no evidence that it was used in any service that would bring it within paragraph (b) of Rule 129.

Errors not assigned below nor pointed out in the complaint cannot be assigned in the court above.

Harrison v. *Pullman Co.*, 68 Fed. (2d) 826.
Blair v. *Oesterlein Mch. Co.*, 275 U. S. 220.

Penna. RR. Co. v. *Public Utilities Comm.*, 298 U. S. 170.
McGoldrick v. *Campagnie, etc.*, 309 U. S. 430.

No such error as mentioned in the caption having been assigned below nor in the petition for writ of certiorari, the question cannot be raised here. When a question is not raised in the bill of complaint it cannot be considered by this Court on appeal.

Dayton-Goose Creek RR. Co. v. *U. S.*, 263 U. S. 456.
San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89.
Cole v. *Ralph*, 252 U. S. 286.
National Security Bank v. *Butler*, 129 U. S. 223.
Magruder v. *Drury*, 253 U. S. 106.
Old Jordan Min. & Mill. Co. v. *Societe, etc.*, 164 U. S. 261.

It is only in exceptional cases, and then only in cases coming from the Federal Courts, that this Court considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below nor pointed out in the bill of complaint.

McGoldrick v. *Campaigne, etc.*, 309 U. S. 430.
Blair v. Oesterlein Mch. Co., 275 U. S. 220.
Duigan v. *U. S.*, 274 U. S. 195.
U. S. v. *Tennessee & Coosa RR. Co.*, 176 U. S. 242.
West v. *Rutledge Timber Co.*, 244 U. S. 90.
Ana Maria Sugar Co. v. *Quinones*, 254 U. S. 245.
Grant Bros. Const. Co. v. *U. S.*, 232 U. S. 647.
Rosen v. *U. S.*, 161 U. S. 29.

This is not an exceptional case, and under the rules of this Court and the decisions of this Court, this point cannot now be raised for the first time.

V.

Conclusion.

1. The evidence shows an absence of negligence by the respondent proximately causing decedent's death.

2. Congress, by the 1939 amendment to the Federal Employers' Liability Act, limited the withdrawal of the defense of assumption of risk to negligence of the carrier, or any of its officers, agents, or employees, or by reason of any defect or insufficiency, due to *its* negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment; and did not impose any new or higher duties upon carriers, and there being no evidence in the record of respondent's negligence in such respect, the doctrine of assumption of risk applies.

3. The petitioner, not having alleged in the complaint nor urged in the trial court, the Circuit Court of Appeals, or this Court in the petition for writ of certiorari, the question of negligence under the Boiler Inspection Act, is precluded from urging it now for the first time.

Respondent, therefore, submits that the opinion of the Circuit Court of Appeals for the Fourth Circuit should be affirmed.

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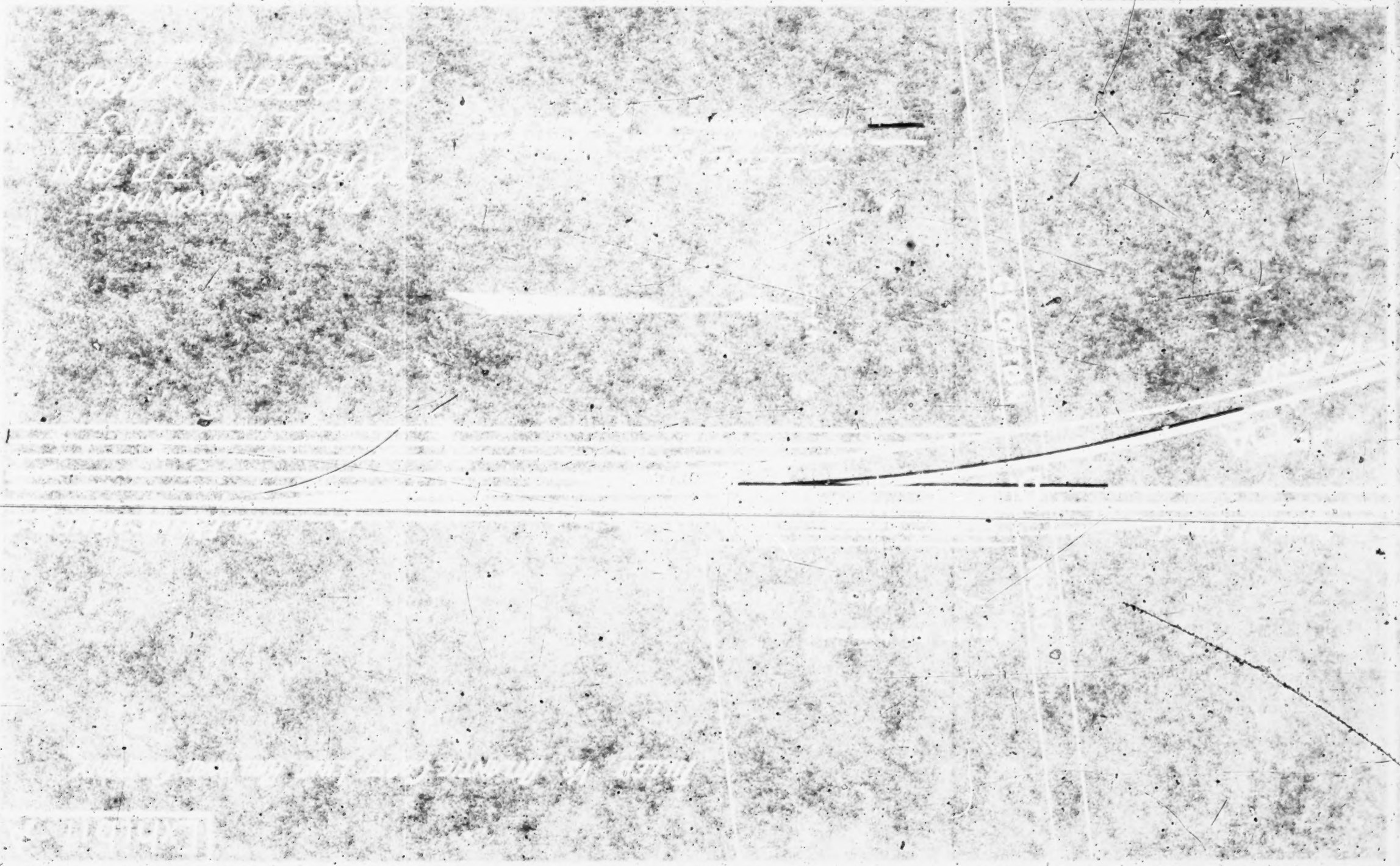
November 23, 1942.



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SUPREME COURT OF THE UNITED STATES.

No. 296.—October Term, 1942.

Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, Deceased, Petitioner, *vs.* Atlantic Coast Line Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 1, 1943.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner's husband and intestate, John Lewis Tiller, was a policeman for the respondent railroad. Among his duties was that of inspecting the seals on cars in railroad yards to make sure that no one had tampered with them. He had held this position for some years, was familiar with the yard, and was aware, in the words of the court below, that respondent's employees "are instructed that they must watch out for the movement of the trains as no employee watches out for them and no lights are used at night on the head end of back-up movements except when an employee is placed at the back end with a lantern to protect a road crossing." The Circuit Court of Appeals found that there was evidence sufficient to sustain the following account of the tragedy:

On the night of March 20, 1940, Tiller was standing between two tracks in the respondent's switch yards, tracks which allowed him three feet, seven and one-half inches of standing space when trains were moving on both sides. The night was dark[1] and the yard was unlighted. Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track. The rear of the train which killed Tiller was unlighted although a brakeman with a lantern was riding on the back step on the side away from Tiller.

[1] It was so dark that when the engineer after the accident asked the fireman to pick up an object near the tracks, the fireman replied, "No, I am afraid to go down in the dark by myself; you come with me."

The bell was ringing on the engine but both trains were moving and the Circuit Court found that it was "probable that Tiller did not hear cars approaching" from behind him. No special signal of warning was given.

Petitioner brought this suit to recover damages under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.* The complaint alleged negligent operation of the car which struck ~~defendant~~ deceased and failure to provide a reasonably safe place to work. Respondent denied negligence, pleaded contributory negligence on the part of the ~~defendant~~ deceased, and set up as a separate defense that the deceased had assumed all the risks "normally and necessarily incident to his employment." After the plaintiff's evidence had been heard the defendant moved for a directed verdict on the grounds (a) that the evidence disclosed no actionable negligence and (b) that the cause of the death was speculative and conjectural. The motion was granted, judgment was accordingly entered for the defendant and the Circuit Court of Appeals, interpreting the decision of the district court as resting on a conclusion that the evidence showed no negligence, affirmed. 128 F. 2d 420. This result was based on a holding that the deceased had assumed the risk of his position and that therefore there was no duty owing to him by respondent. We granted certiorari because of the important question involved in the Circuit Court of Appeals' interpretation of the scope and effect of the 1939 amendment to the Federal Employers' Liability Act, 53 Stat. 1404, 45 U. S. C. 54. The amendment provides that an "employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

The Circuit Court distinguished between assumption of risk as a defense by employers against the consequence of their own negligence, and assumption of risk as negating any conclusion that negligence existed at all. The court reasoned that if, for example, the respondent had negligently failed to provide a workman with a sound tool; and he was thereby injured, it could not under the amendment claim that he had assumed the risk of using the defective implement; but that if a workman were injured in the ordinary course of his work, as in such a switching operation as this, the assumption of risk might still be relied upon to prove that the respondent had no duty to protect him from accustomed danger. The court rejected petitioner's argument that since the

doctrine of assumption of risk had been abolished "the carrier can no longer interpose it as a shield against the consequences of its neglect and hence is liable for injuries to its employees in its railroad yards or elsewhere, unless it takes precautions for their safety commensurate with the danger that they are likely to encounter." In rejecting this argument the court below put the core of its decision in these words: "The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of business, and that in circumstances other than those provided for in the amended section of the statute, *the doctrine of the assumption of the risk must be given its accustomed weight.*"

We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent of non-negligence.[2] We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence". As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, "Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name;"[3] and no such result can be permitted here.

Perhaps the nature of the present problem can best be seen against the background of one hundred years of master-servant

[2] See, e. g., St. L. & W. R. R. v. Allen, 276 U. S. 165, 171, 172; Mo. Pac. R. R. Co. v. Aeby, 275 U. S. 426, 430. It is sometimes said that courts have held the master blameless in actions by employees who have entered and remained in hazardous occupations on the premise that the employee assumed the risk; but the theory has not always appeared under the name "assumption of risk" since the same result is reached by assigning a given case to one of three practically interchangeable categories: (a) the employee assumed the risk; (b) he was guilty of contributory negligence; (c) the master was not negligent. See 35 Am. Jur. 719 and 3 Labatt, Master and Servant, 2d ed. par. 1164-1172, 1205, 1210. The court below thought the Amendment eliminated defense (a) but in effect retained defense (c).

[3] Schlemmer v. Buffalo, Rochester, etc. Ry., 205 U. S. 1, 12, 13.

tort doctrine. Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the "human overhead" which is an inevitable part of the cost—to someone—of the doing of industrialized business.[4] The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry.[5] The assumption of risk doctrine for example was attributed by this Court to "a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to considerable and often ruinous responsibilities, thereby embarrassing all branches of business," but would also encourage carelessness on the part of the employee.[6] In the pursuit of its general objective the common law took many forms and developed many doctrines. One of the first was the fellow servant-assumption of risk rule which originated in *Priestly* v. *Fowler*.[7] In *Priestly* v. *Fowler*, the Court said, "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably appre-

[4] The following table drawn from the 51st through the 55th Reports of the Interstate Commerce Commission, indicates that a substantial number of railroad employees are killed and injured each year:

Employees Killed and Injured on Steam Railways

	Killed	*Injured*
1936	593	9,021
1937	557	9,294
1938	386	6,481
1939	400	6,988
1940	475	7,956

[5] See 35 Am. Jur. 717; and for discussion of this view see Pound, Economic Interpretation of Torts, 53 Harv. L. Rev. 365, 373.

[6] Tuttle v. Milwaukee Railway, 122 U. S. 189, 196. Representative Claiborne, advocating a bill to abolish assumption of risk as a defense under the Federal Employers' Liability Act at a Committee Hearing in the 75th Congress expressed a contrary view as to the usefulness of the doctrine as an accident preventive: "The courts went along and commenced to weave into the decisions this assumption of risk doctrine . . . . They said for one thing that it is good public policy to hold the employee liable when he knew of certain conditions and did not protect himself against them; that by doing that, you made the man better regard his two legs, or better regard his two hands, or better regard his stomach. Why, no employee of a railroad company is going out there and lose an arm or an eye or a leg and rely on a jury to made him whole." Hearings before Sub-committee Number 4 of the Committee on the Judiciary, House of Representatives, 75th Cong., 1st Sess., on H. R. 5755, H. R. 7336 and H. R. 7621, p. 62.

[7] 3 M. & W. 1, 6 (Ex. 1837); on the question of which was the first case creating this doctrine, cf. Chicago & Milwaukee Railway v. Ross, 112 U. S. 377, 386.

hends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

As English courts lived with the assumption of risk doctrine they discovered that the theory they had created had become morally unacceptable but of such legal force that it could not be repudiated.[8] The English sought to eliminate the fellow servant rule, which placed the burden of an employee's negligence as it affected another employee on the injured person rather than on the business enterprise, by the Employers' Liability Act of 1880[9] and found that the assumption of risk doctrine still left the employee in a hopelessly unprotected position. In the leading case of *Thomas* v. *Quartermaine*, 18 Q. B. D. 685 (1887), the court held that an employee standing on a three foot runway between two unfenced vats who was attempting to dislodge a piece of wood from one of the vats and who by accident fell into the other and was scalded was barred from recovery. Since he had long known of the possible dangers of the narrow passage he was held to have assumed the risk of his position. In 1897 the English finally abandoned the common law remedy altogether as a protection for injured employees and adopted a workmen's compensation law. 60 & 61 Vict. c. 37.

This Court accepted the assumption of risk doctrine as applied to railroad employees, at least in part, in 1879.[10] That decision placed the employee's assumption of risk upon the theory that an agreement to assume the risk was implied from the terms of the employment contract.

Prior to the passage of the Federal Employers' Liability Act of 1906 the assumption of risk doctrine, except for a considerable

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8 "Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of employment, takes it or continues in it with a knowledge of its risks, he must trust himself to keep clear of injury." Woodley v. Metropolitan Dist. Ry. Co., L. R. 2 Ex. Div. 384 (1877).

9 For brief discussion of the English experience see Packer, Workmen's Compensation, Sen. Doc. 618, 62nd Cong., p. 5; Cohen, Workmen's Compensation in Great Britain, chap. 3. For an account covering the history of English and American Workmen's Compensation laws see Dodd, Administration of Workmen's Compensation, chaps. 1 & 2.

10 Hough v. Texas & Pac. Railroad Co., 100 U. S. 213, 217. See also Narramore v. Cleveland, etc. Ry. Co., 96 F. 2d 298.

vagueness as to its relation with contributory negligence, was fairly well known.[11] It had already been applied generally at the time of the adoption of the Act because of acceptance of the theory that the employee's compensation was based upon the added risk to his position and that he could quit when he pleased. *Tuttle* v. *Milwaukee Railway, supra;* and compare for a restatement of this view after the passage of the Employers' Liability Act, *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 504.[12] Federal and state courts, with some notable exceptions, accepted and applied the rule with all of its implications and consequences except when expressly prohibited from doing so by statute.[13]

Congress took a major step toward modification of the common law barrier against employee recovery in accident suits in the Federal Employers' Liability Act of 1906, 34 Stat. 232, repassed with alterations not material in 1908, 35 Stat. 65. This Act, in its principal features, abolished the fellow servant rule, substituted comparative negligence for the strict rule of contributory negligence, and allowed survivors' actions for tort liability. Section 4 of that Act, as interpreted by this Court in *Seaboard Air Line Railway* v. *Horton, supra,* perpetuated the defense of assumption of risk.[14] Unfortunately, from the standpoint of legal

[11] See Warren, Volenti Non Fit Injuria, etc., 8 Harv. L. Rev. 457 (1895); Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 91 (1906).

[12] Senator Neely, sponsor of the 1939 amendment, explicitly rejected the economic theory which was the basis of the early opinions: "The contention that you have advanced apparently implies the theory that the employee . . . voluntarily assumed the risk in spite of the fact that the employer said, in effect, 'You take the risk or you get no job.' In these days when millions of unemployed must find work in order to save themselves and their families from distress, the situation is so desperate that men will sign any sort of waiver or agreement in order to obtain employment." Hearings, Subcommittee of the Senate Judiciary Committee, 76th Cong., 1st Sess., on S. 1708, p. 33.

[13] For collections of early state cases, see 49 L. R. A. 33 and 97 Amer. State Reports 877. Early state and foreign statutes are summarized in the Report of the House Judiciary Committee on the 1906 Act, Rept. No. 2335, p. 2, and decisions on state statutes are collected in the Am. State Rep. note, 891. The Seaboard Air Line case, *supra,* held these statutes inapplicable to actions under the federal act.

[14] For a vigorous attack on this decision, see Buford, Assumption of Risk Under the Federal Employers' Liability Act, 28 Harv. L. Rev. 163; and see Peterson, The Joker in the Federal Employers' Liability Act, 80 Cent. L. J. 5. The House Judiciary Committee in reporting a bill aimed at making some minor modification in the assumption of risk rule stated that the 1908 Congress never "dreamed, when it passed this former law, that this defense [assumption of risk] would ever be raised by the use of" § 4 of the Act. Report of the House of Representatives Committee on Judiciary, 76th Cong., 1st Sess., Rept. No. 1222, on H. R. 4988, p. 4.

clarity, the Act as interpreted required careful distinction between assumption of risk and contributory negligence, since assumption of risk was an absolute bar to recovery while contributory negligence merely reduced the amount of recovery. The great uncertainty existing prior to the Act as to what the margin between these doctrines was[15] thus became of real significance. The language of the statute itself seemed to impel the courts to practice "the niceties if not casuistries of distinguishing between assumption of risk and contributory negligence, conceptions which never originated in clearly distinguishable categories but were loosely interchangeable until the statute attached such vital differences to them." *Pecheco* v. *N. Y., N. H. & H. R. Co.*, 15 F. 2d 467. For an attempt to distinguish between the doctrines, see *Schlemmer* v. *Buffalo Railway, supra*, 12, and the same case at 220 U. S. 590, 596.

The assumption of risk clause in the statute became the subject of endless litigation. The Federal Code Annotated ~~devotes over 30 pages~~ of fine type merely to the citation and brief summary of the reported decisions and the number of unreported and settled cases in which the defense was involved must run into the thousands.[16] Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the "primary duty rule" in which contributory negligence through violation of a company rule became assumption of risk. *Unadilla Valley Ry.* v. *Caldine*, 278 U. S. 139; *Davis* v. *Kennedy*, 266 U. S. 147. Other complications arose from the introduction of "promise to repair", "simple tool", and "peremptory order" concepts into the assumption doctrine.[17] In the disposition of cases the question of a plain-

and the United States Code Annotated devote over thirty pages each

[15] See 49 L. R. A. 33, 49 (Relation Between Defenses of Assumption of Risk and Contributory Negligence), and 35 Am. Jur. 719 (Pragmatic Distinctions Shown to be Lacking).

[16] For some analysis of the cases, see Note, 32 Col. L. Rev. 1384, 53 Harv. L. Rev. 341, 71 A. L. R. 451, 89 A. L. R. 693. For an estimate of their quantity see Schoene and Watson, Workmen's Compensation on Interstate Railways, 47 Harv. L. Rev. 389, 394.

[17] "In thousands of cases the doctrine is complicated by 'promise to repair,' 'peremptory order,' and other special incidents. The 'simple tool' doctrine also arose as an exception. The 'promise to repair' aspect of the question is further confused by two superimposed theories; that the employee may rely upon such promise for a reasonable time and, next, that if the danger was so manifest that no reasonable person would act upon such promise, then assumption of risk is reestablished." House Committee Report, *supra*, Note 14, p. 4. For a collection of citations on all of the assumption of risk problems, see 2 Roberts Federal Liability of Carriers, 2nd ed., Chapter 39. For

tiff's assumption of risk has frequently been treated simply as another way of appraising defendant's negligence,[18] as was done by the court below in the instant case.

It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed.

If this were not sufficiently clear from the language of the amendment, any doubt would be dissipated by its legislative history. The 1939 bill[19] was introduced by Senator Neely and was supported at the hearings by the railway labor unions. It was accepted both by the unions and the railroads that the bill would utterly and completely abolish the defense of assumption of risk.[20] The report of the Senate Judiciary Committee struck at the basic reasons advanced by common law courts for the existence of the doctrine, declared it unsuited to present day activities, and described them as out of harmony with the equitable principles which should govern determinations of employer-employee responsibilities.[21] The bill, as described in the report, was clearly aimed at making the principles of comparative negligence the guiding

a discussion of the 'simple tool' doctrine see Jacob v. City of New York, 315 U. S. 752, 756.

[18] Harper, The Law of Tort, 292.

[19] S. 1708, 76th Cong., 1st Sess.

[20] Substantially the same proposal as that finally adopted in 1939 was before the 75th Congress in H. R. 7336. The chief labor exponent of that bill said: The "bill in its nature is intended to relieve the servant from the assumption-of-risk doctrine as interpreted and applied by our United States Supreme Court." Hearings, *supra*, Note 6, p. 69. Or, as it was put by the principal railroad representative at the 1939 Senate hearings, "Here . . . the proposal is to abolish the defense of assumed risk, to abolish it in toto." Hearings, Note 12, *supra*, p. 37, 38.

[21] "But such simple doctrines do not apply equitably under the complexities of modern industrial practices when one's fellow servants may be numbered by hundreds or even thousands, and unlimited output and maximum speed are watchwords on every hand. The common-law doctrine of assumption of risk, as applied to the worker in a small factory, cannot be fairly applied to the railroad man, whose services are performed over 150 miles of railroad track, or in a large and congested railroad yard.

"The present rule apparently ignores the fact that the master, and not the servant, has control over the conditions which affect the safety of employees. . . . The existing rule not only permits the employer to be careless about the condition of his premises but, in effect, places a premium upon his carelessness. . . .

"Under present economic conditions, employees must, of necessity, continue

rules of decision in accident cases: "The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned."[22]

The purpose of the Act is made clearer upon analysis of the House bill which was rejected by the conference committee in favor of the Senate bill which is now the law. The House bill[23] was intended to preserve some part of the doctrine of assumption of risk, preserving that defense except "where said employee has not had actual notice of any negligently maintained condition or practice." The bill, unlike the Senate bill as the Representative reporting it explained, left untouched the rule of *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, "namely, that in the absence of special custom or unusual circumstances, a man who is run over by a switching movement cannot recover."[24] It was the Allen opinion on which the court below in the instant case particularly relied. But the House bill, which the chief railroad counsel appearing before the Senate committee conceded would make no change in the existing law,[25] was rejected in conference. The *Allen* case was specifically and caustically discussed at the Senate hearings; and the Senate bill was clearly aimed at ending its rule.[26]

The doctrine of assumption of risk can not be "abolished in toto"[27] and still remain in partial existence as the court below suggests. The theory that a servant is completely barred from

to work under unsafe conditions or frequently sacrifice the fruits of many years of accumulated seniority, go on relief, or beg their bread."

Report of the Senate Committee on Judiciary, 76th Cong., 1st Sess., Rept. No. 661, p. 4.

[22] One statement by the bill's chief supporter at the Senate Hearings comes very close to covering the instant case: "It gets back to our original argument that the courts have so enlarged upon this doctrine that we are confronted with such a situation as this: A poor fellow working in a yard, intent upon his work, and somebody kicks a car on top of him, and the courts, notwithstanding he has no knowledge of it, if he is struck, hold that he has no right to recover. It may be that he was negligent, but again I say the comparative negligence doctrine should be applied." Hearings, Note 12, *supra*, p. 78.

[23] H. R. 4988, 76th Cong., 1st Sess.

[24] House Report, Note 14, *supra*, p. 6.

[25] Senate Hearings, Note 12, *supra*, p. 61.

[26] Senate Hearings, Note 12, *supra*, 14, 17, 76, 81.

[27] *Supra*, Note 20.

recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon. The Act of 1908 and the amendment of 1939 abolish the post-*Priestly* v. *Fowler* defenses and authorize comparison of negligence instead of barring the employee from all recovery because of contributory negligence. They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.

In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done.[28] A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: "In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances."[29] Of course in any case the standard of care must be commensurate to the dangers of the business. *Hough* v. *Railway Co.*, 100 U. S. 213, 218; cf. *Northern Pacific Railroad Co.* v. *Herbert*, 116 U. S. 642, 652.

No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." *Jones* v. *Tennessee etc. Railroad Co.*, 128 U. S. 443, 445. Or as we have put it on another occasion, "Where the facts are in dispute, and the evidence in relation to

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[28] Railroad Co. v. Jones, 95 U. S. 439, 442; Texas & Pacific Railway v. William K. Barrett, 166 U. S. 617, 619. Grand Trunk Railroad Co. v. Ives, 144 U. S. 408.

[29] Sen. Report, *supra*, Note 21, p. 4.

them is that from which fair-minded men may draw different inferences", the case should go to the jury.[30]

We think that the question of negligence on the part of the railroad and on the part of the employee should have been submitted to the jury. The decision below is reversed and the case is remanded for further proceedings in conformity with this opinion.

It is so ordered.

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[30] Washington etc. Railroad Co. *v.* McDade, 135 U. S. 554, 572. See also Kane *v.* North Central Railway, 128 U. S. 91, 95, 96; Hough *v.* Texas & Pacific Co., *supra*, 225; Jacob *v.* City of New York, 315 U. S. 752, 757. It appears to be the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury: "At the beginning this defense [assumption of risk] was deemed to be at most a jury question. But repeated holdings have encroached more and more upon the right of the employee and various new doctrines or amplifications of previous principles have tended constantly to treat this defense as one to be determined by the courts as 'matter of law'—taking it away from the jury; and the courts have decided now it is a question of law." House Report, *supra*, Note 14, p. 1. Cf. Delaware etc. R. Co. *v.* Koske, 279 U. S. 7, 11; Toledo, St. Louis and W. R. Co. *v.* Allen, 276 U. S. 165, 170.

SUPREME COURT OF THE UNITED STATES.

No. 296.—October Term, 1942.

Hattie Mae Tiller, Executor of the Estate of John Lewis Tiller, Deceased, Petitioner, *vs.* Atlantic Coast Line Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 1, 1943.]

Mr. Justice Frankfurter, concurring.

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas. Thus, in the setting of one set of circumstances, "assumption of risk" has been used as a shorthand way of saying that although an employer may have violated the duty of care which he owed his employee, he could nevertheless escape liability for damages resulting from his negligence if the employee, by accepting or continuing in the employment with "notice" of such negligence, "assumed the risk". In such situations "assumption of risk" is a defense which enables a negligent employer to defeat recovery against him. In the setting of a totally different set of circumstances, "assumption of risk" has a totally different meaning. Industrial enterprise entails, for all those engaged in it, certain hazards to life and limb which no amount of care on the part of the employer can avoid. In denying recovery to an employee injured as a result of exposure to such a hazard, where the employer has in no sense been negligent or derelict in the duty owed to his employees, courts have often said that the employee "assumed the risk". Here the phrase "assumption of risk" is used simply to convey the idea that the employer was not at fault and therefore not liable.

Plainly enough only mischief could result from using a single phrase to express two such different ideas. Such ambiguity necessarily does harm to the desirability of clarity and coherence in any civilized system of law. But the greater mischief was that in one of its aspects the phrase "assumption of risk" gave judicial expression to a social policy that entailed much human misery. The notion of "assumption of risk" as a defense—that is, where the employer concededly failed in his duty of care and nevertheless escaped liability because the employee had "agreed" to "assume the risk" of the employer's fault—rested, in the context of our industrial society, upon a pure fiction. And in all English-speaking countries legislation was necessary to correct this injustice. In enforcing such legislation the courts should not lose sight of the ambiguous nature of the doctrine with which the legislation dealt. In giving effect to the legislative policy, care must be taken lest such ambiguity perpetuate the old mischief against which the new legislation was directed.

Our present concern is with the Federal Employers' Liability Act. Prior to 1939, the only inroad made by the Act upon the doctrine of "assumption of risk" as a defense to liability arising from negligence was that in any action brought by an employee, he "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." Section 4 of the Act as amended April 22, 1908, c. 149, 35 Stat. 65. The provision was construed, naturally enough, to mean that "the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees. In other cases, therefore, it is retained." *Jacobs* v. *Southern R. R.*, 241 U. S. 229, 235. By only partially withdrawing the defense of "assumption of risk", Congress enabled the railroads to avoid liability in many situations where the employee's injury resulted from the negligence of the carrier in the only way in which an employer can be negligent, namely, through the negligence of its servants. In other words, Congress continued to sanction the fiction of attributing to employees a willingness to bear the consequences of the carrier's negligence, other than that arising from its violation of a statute enacted for the safety of employees.

This was the unfortunate situation which the 1939 amendment, the Act of August 11, 1939, c. 685, 53 Stat. 1404, sought to remedy. To § 4 was added the provision that in any action brought by an employee he "shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ." The effect of this provision is to make it clear that, whatever other risks an employee may assume, he does not "assume the risk" of the negligence of the carrier or its other employees. Once the negligence of the carrier is established, it cannot be relieved of liability by pleading that the employee "assumed the risk".

But the 1939 amendment left intact the foundation of the carrier's liability—negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a carrier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence. Congress has to some extent alleviated the doctrines of the law of negligence as applied to railroad employees. By specific provisions in the Federal Employers' Liability Act, it has swept away "assumption of risk" as a defense once negligence is established. But it has left undisturbed the other meaning of "assumption of risk", namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent.

The point is illustrated by two opinions of Mr. Justice Holmes. In *Schlemmer* v. *Buffalo, Rochester, &c. Ry.*, 205 U. S. 1, 12-13, he called attention to the danger of relieving from liability for negligence by talking about "assumption of risk"—a danger resulting from the ambiguity of the phrase. "Assumption of risk" by an employee may be a way of expressing the conclusion that he has been guilty of contributory negligence. But an employee cannot be charged with contributory negligence simply because he "assumed the risk"; the inquiry is, did his conduct depart from that of a reasonably prudent employee in his situation? As Mr. Justice Holmes admonished us in the *Schlemmer*

case, "unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name." *Ibid.* That case was decided before the Federal Employers' Liability Act was in force. In a later case arising under the Act, *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218, Mr. Justice Holmes for a unanimous Court reversed a judgment for the plaintiff on the ground that the employee's death was caused by a failure to keep a lookout which was one of the "usual risks" of his employment. To be sure, this decision was made prior to the 1939 amendment, but in this respect that enactment makes no change in the law. The basis of an action under the Act remains the carrier's negligence. The carrier is not to be relieved from the consequences of its negligence by any claim that the employee "assumed the risk" of its negligence. But neither is the carrier to be charged with those injuries which result from the "usual risks" incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care.

"Assumption of risk" as a defense where there is negligence has been written out of the Act. But "assumption of risk", in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase "assumption of risk" is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded. But until Congress chooses to abandon the concept of negligence, upon which the Act now rests, in favor of a system of workmen's compensation not dependent upon negligence, the courts cannot discard the principle expressed, in one of its senses, by the phrase "assumption of risk", namely, that a carrier is not liable unless it was negligent.

Perhaps no field of the law comes closer to the lives of so many families in this country than does the law of negligence, imbedded as it is in the Federal Employers' Liability Act. It is most desirable, therefore, that the law should not be cloudy and confused. I am not at all certain that the Circuit Court of Appeals misconceived the nature and extent of the carrier's liability after the 1939 amendment, rather than merely obscured its understanding by beclouding talk about "assumption of risk". But since I agree that the District Court should have allowed the case to go to the jury on the issue of negligence, I concur in the decision.